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IN THE

Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., ET AL.,
Petitioners,

—against—

EDWARD BLANKENSHIP, ET AL.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITZ,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER
and ELLA AMBATS,
Petitioners,

—against—

ADELINE T. ZAK and THADDEUS O. ZAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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July 6, 1982

QUESTIONS PRESENTED

1. May the Chief Justice of the Ohio Supreme Court become a candidate for Governor, raise funds and campaign, but refuse to resign his judicial office and instead adjudicate cases—including cases of demonstrated importance to his campaign contributors—without violating petitioners' Fourteenth Amendment right to a hearing before a fair and impartial tribunal?

2. May Ohio, having adopted a Judicial Code which guarantees to every litigant a hearing before a judge who is not a political candidate, arbitrarily deny that right to petitioners without violating the Fourteenth Amendment guarantee of due process and equal protection of law?

Petitioners have filed one petition seeking a writ of certiorari to review the judgments of the Supreme Court of Ohio in three cases, as provided in this Court's Rule 19.4.

Petitioners in *Cincinnati Milacron Chemicals, Inc., et al. v. Edward Blankenship, et al.* (hereinafter *Cincinnati Milacron*) are Cincinnati Milacron Chemicals, Inc., Ralph Binns, Joseph Mazzei, Kenneth Zeigel, Robert C. Whitman, Ed Wolff, William Jones, and Alan Berenson.

Respondents are Edward Blankenship, Hazel Blankenship, Austin Reed, Mabel Reed, Perry Wood, Mary Wood, Hubert D. Burns, Ruth Burns, Steven R. Brotherton, Deborah S. Brotherton, Kenneth G. Roberts, Jr., Cheryl Roberts, Robert L. Pullens, John Smith, and Marylou Smith.

Additionally, the Ohio AFL-CIO filed a brief *amicus curiae* on behalf of respondents in the court below. The Ohio Chamber of Commerce, American Steel Foundries, General Electric Company, Lighting Business Group, Lampson and Sessions Company, and the Standard Oil Company filed a brief *amicus curiae* on behalf of petitioners in the court below in support of petitioners' motion for rehearing.

Petitioner Cincinnati Milacron Chemicals, Inc., was a wholly-owned subsidiary of Cincinnati Milacron Inc. when this action was brought by respondents. Petitioner has no subsidiaries except wholly-owned subsidiaries. A list of the subsidiaries of its parent, Cincinnati Milacron Inc., as set forth in its 1981 Form 10-K, appears at App. 219. On May 15, 1980, Thiokol Corporation acquired all the outstanding capital stock of Cincinnati Milacron Chemicals, Inc. (now renamed Carstab Corporation). A list of the subsidiaries of Thiokol Corporation, as listed in its 1981 Form 10-K, appears at App. 220.

All of the parties to this petition in *Minster Machine Company v. Virginia Mae Knitz* (hereinafter *Minster Machine*) are listed in the caption. Additionally, in the court below the American Metal Stamping Association filed a brief *amicus curiae* on behalf of petitioners and the Ohio Academy of Trial Lawyers filed a brief *amicus curiae* on behalf of respondents. Petitioner Minster Machine Company has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

All of the parties to this petition in *St. Vincent Hospital and Medical Center and Ella Ambats v. Adeline T. Zak and Thaddeus O. Zak* (hereinafter *St. Vincent Hospital*) are listed in the caption. Petitioner St. Vincent Hospital and Medical Center (technically known as St. Vincent Hospital and Medical Center of Toledo, Ohio) has no parent company or wholly owned subsidiaries. By some definitions it might be termed to be affiliated with the St. Vincent Hospital and Medical Center Foundation and the Farley Health Care Corp., of Toledo, Ohio.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners seek a writ of certiorari to review the judgments of the Supreme Court of Ohio entered on February 26 and March 3, 1982, and the orders denying rehearing entered on March 9 and April 7, 1982.

OPINIONS BELOW

A. Cincinnati Milacron

The opinion of the Supreme Court of Ohio entered on March 3, 1982, is reported at 69 Ohio St. 2d 608, 433 N.E. 2d 572, and appears at App. 9.[1] The unreported opinion of the Court of Appeals of Hamilton County entered on January 14, 1981, appears at App. 32. An unreported opinion of the Court of Common Pleas of Hamilton County issued September 26, 1979, appears at App. 28. An unreported order of the Court of Common Pleas of Hamilton County entered on October 5, 1980, appears at App. 31.

B. Minster Machine

The opinion of the Supreme Court of Ohio entered on February 26, 1982, is reported at 69 Ohio St. 2d 460, 432 N.E.2d 814, and appears at App. 66. The unreported opinion of the Court of Appeals of Lucas County entered on December 19, 1980, appears at App. 83. The unreported judgment entry and opinion of the Court of Common Pleas of Lucas County entered on February 19, 1980, appears at App. 79.

C. St. Vincent Hospital

The opinion of the Supreme Court of Ohio entered on February 26, 1982, is reported at 69 Ohio St. 2d 471, 433 N.E.2d 162, and appears at App. 123. The unreported opinion of the Court of Appeals of Lucas County entered on March 6, 1981, appears at App. 138. The unreported memorandum decision and judgment entry of the Court of Common Pleas of Lucas County entered on May 19, 1980, appears at App. 129.

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[1] References to the appendix to this petition will be cited as "App. ".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

The judgment of the Supreme Court of Ohio in *Cincinnati Milacron* was entered on March 3, 1982. Petitioners' timely petition for rehearing was denied on April 7, 1982. (A copy of the order denying that petition appears at App. 42.) The time within which to file a petition for certiorari extends to July 6, 1982.

The judgment of the Supreme Court of Ohio in *Minster Machine* was entered on February 26, 1982. Petitioner's timely petition for rehearing was denied on March 9, 1982. A copy of the order denying that petition appears at App. 103.

The judgment of the Supreme Court of Ohio in *St. Vincent Hospital* was entered on February 26, 1982. Petitioners' timely motion for rehearing was denied on March 9, 1982. A copy of the order denying that petition appears at App. 143.

An order signed by Justice Sandra D. O'Connor on May 27, 1982, extended to July 6, 1982, the time to file petitions for writs of certiorari by Minster Machine Company and St. Vincent Hospital & Medical Center and Ella Ambats. A copy of that order appears at App. 7.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution (App. 1.)

Ohio Code of Judicial Conduct, Canon 7, 36 Ohio St. 2d xix, xxxii (1974) (App. 1.)

STATEMENT OF THE CASE

The events which require the filing of this petition first arose while petitioners' cases were pending before the Supreme Court of Ohio. Those events, together with the procedural history of the cases below, are as follows:

1. The Announcement of the Chief Justice's Gubernatorial Candidacy

At a press conference held in the Statehouse Rotunda in Columbus, Ohio, on January 15, 1982, Chief Justice Frank D. Celebrezze of the Ohio Supreme Court announced his candidacy for the Democratic Party nomination for Governor of the State. The Chief Justice repeated that announcement at press conferences in Cleveland later that day and in Toledo and other cities on January 19, 1982. (App. 161,121.)

The Chief Justice's announcement was accompanied by a press release, dated January 15 and issued on his Supreme Court stationery. The press release announced that "I will be a candidate for governor", that "this has been both the most difficult and the easiest decision of my life, but I feel this decision is right. One of the reasons is the support of my wife, Mary Ann. We have talked and prayed over it for months." (App. 161.)

The Chief Justice went on to state:

> "I will inform the public, directly, what to expect from a Celebrezze administration—on jobs, senior citizens, crime and justice, the budget, education, mass transportation, energy and our environment—all of the matters that concern Ohioans. . . .
>
> "The plain fact is that we can no longer accept a state administration which lurches from crisis to crisis—spending more, delivering less and watching the quality of Ohio life decline. For example, nearly 13 percent of our people—643,000 men and women—are now out of work. Our situation demands straight talk and unconventional action. We need to recapture control of Ohio's destiny." (App. 162-63.)

After noting that "[m]y campaign will never ... match my opponents' financial warchests", the Chief Justice concluded:

> "I want to be Governor because I believe there are millions of honest Ohioans who feel that the system isn't working for them. I believe Ohio deserves better, and I am confident that my candidacy is best for Ohio." (App. 163.)

Chief Justice Celebrezze was aware that Ohio's Code of Judicial Conduct—like the Judicial Codes for forty-seven other states and for the federal courts—requires that "a judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office. ..." (Canon 7(A)(3), 36 Ohio St. 2d xix, xxxii (1974); App. 2.)[2] The Ohio Code is mandatory and is binding on all judicial officers in the State.[3] The Code provision was adopted by the Ohio Supreme Court under its state constitutional power to

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[2] The code provisions for the federal courts and states other than Ohio are listed and discussed at App. 215-18. These code provisions have consistently been upheld against constitutional challenge. *See, e.g., Signorelli* v. *Evans,* 637 F.2d 853 (2d Cir. 1980); *Morial* v. *Judiciary Commission of Louisiana,* 565 F.2d 295 (5th Cir. 1977), *cert. denied,* 435 U.S. 1013 (1978). *See also Clements* v. *Fashing,* 50 U.S.L.W. 4869 (U.S. June 25, 1982)(No. 80-1290).

[3] In its Preface to the Code of Judicial Conduct, the Supreme Court stated that "The canons and text establish mandatory standards unless otherwise indicated". 36 Ohio St. 2d at xix.

In *Cuyahoga County Board of Mental Retardation* v. *Association of Cuyahoga County Teachers of the Trainable Retarded,* 47 Ohio App. 2d 28, 351 N.E.2d 777 (Cuyahoga County 1975), the Court said:

> "In examining the Code of Judicial Conduct it is apparent that while the permissible guidelines are indicated by the use of the word 'may,' the mandatory portions are set forth by the use of the word 'should.' This is entirely consistent with the plain meaning of a word which expresses an obligation or duty." (47 Ohio App. 2d at 33, 351 N.E.2d at 782.)

Rule IV of the Supreme Court Rules for the Government of the Bar of Ohio provides that the Code of Judicial Conduct "shall be binding upon all judicial officers of this state". Rules Governing the Courts of Ohio 571, 577 (Anderson 1981).

regulate "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law". Ohio Const. art. IV, § 2. *See Mahoning County Bar Association v. Judge Franko*, 168 Ohio St. 17, 151 N.E.2d 17 (1958), *cert. denied*, 358 U.S. 932 (1959).

Chief Justice Celebrezze, however, did not resign on January 15. Instead, he announced at that time that he would continue to participate in the cases then pending before the Supreme Court in which argument had been heard, and would not resign until "immediately following release" of those decisions. (App. 161.) He announced that he had a "personal deadline of the week of February 22" and that he was "doing everything I can to expedite that process". (App. 161.) The Chief Justice also said that he would make no more politcal statements before his resignation, but his campaign plans and fund-raising activities went forward, including arrangements for a fund-raising dinner on the night he ultimately resigned. App. 121, 210-14.)

The Ohio Supreme Court apparently sought to cooperate with its Chief Justice's plan, although it proved unable to meet his "personal" February deadline for resigning. Between January 15 and March 9—the date on which the Chief Justice finally tendered his resignation—the Ohio Supreme Court produced an unprecedented flurry of decisions: in that seven-week period, over 95 cases were handed down, more than double the average number decided during the entire first quarter in the preceding five years. (*Compare* 69 Ohio St. 2d 47-684 (1982) *with* 65 Ohio St. 2d 1-130 (1981); 61 Ohio St. 2d 1-375 (1980); 57 Ohio St. 2d 1-129 (1979); 53 Ohio St. 2d 1-253 (1978); 49 Ohio St. 2d 155-295 (1977).)

The Chief Justice's continued participation in these cases after he became a gubernatorial candidate was unnecessary. Four justices constitute a quorum of the Ohio Supreme Court (Ohio Const. art. IV, § 2), and the court routinely decides cases with fewer than its full complement of seven justices—indeed, a

number of decisions between January 15 and March 9 were rendered with fewer than seven justices.[4]

2. The Chief Justice's Participation In the Decisions Below

Petitioners were defendants in three of the cases decided by the Ohio Supreme Court after Chief Justice Celebrezze became a candidate for Governor but before he resigned from the court. Two of these cases involved active campaign contributors (as adversaries to petitioners) and issues which were demonstrably important to them and to other groups influential in state politics:

In *Minster Machine,* plaintiff (respondent here) had brought suit for damages as a result of the amputation of two of her fingers while operating a power press manufactured by petitioner Minster Machine Company. The trial court granted summary judgment for petitioner and the Court of Appeals affirmed. (App. 79, 83.)

On appeal to the Ohio Supreme Court, the case attracted considerable attention from competing interest groups. *Amicus curiae* briefs were filed (with the court's permission) on behalf of petitioner by the American Metal Stamping Association and on behalf of respondent by the Ohio Academy of Trial Lawyers. In its motion for leave to file an *amicus* brief, the Trial Lawyers' Academy noted that the lower court's decision "adversely affects the members of the Ohio Academy of Trial Lawyers and their clients" and that the "interest of its member attorneys and their clients in the within case is substantial. . . ."

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[4] Three cases were decided by a six-judge court: *Cleveland Electric Illuminating Co.* v. *Public Utilities Commission,* 69 Ohio St. 2d 258 (February 17, 1982) (Krupansky, J., who recused herself after oral argument, not participating); *State ex rel. Duganitz* v. *Court of Common Pleas,* 69 Ohio St. 2d 270 (February 19, 1982) (Krupansky, J., not participating); *Columbus Bar Association* v. *Thompson,* 69 Ohio St. 2d 667 (March 9, 1982) (Riley, J. (a lower state court judge), sitting for Celebrezze, C.J.; Sweeney, J., not participating).

(App. 206, 207.) The Ohio Academy of Trial Lawyers had contributed at least $1,000 for a fund-raising dinner in April 1981 to "advance the public image of Frank D. Celebrezze".[5]

On February 26, by a four-to-three vote, the Supreme Court ruled in favor of respondent in *Minster Machine*, reversing the decisions of the lower courts and announcing a new standard of strict liability, one that holds a product design "defective" if "(1) it is more dangerous than an ordinary consumer would expect ... or (2) if the benefits of the challenged design do not outweigh the risk inherent in such design." The court explicitly authorized juries within the state to apply the new standard on the basis of "hindsight" rather than foreseeability. (App. 72.) Chief Justice Celebrezze cast his vote—a decisive vote—with the 4-to-3 majority.

In *St. Vincent Hospital*, the plaintiffs below (respondents here) had brought suit for damages as a result of allegedly negligent medical treatment during respondent Adeline Zak's hospitalization. The trial court dismissed all claims as untimely under the one-year statute of limitations governing medical malpractice claims. The Court of Appeals affirmed. (App. 129, 138.) On February 26, 1982, the same day the *Minster Machine* decision was handed down, the Ohio Supreme Court reversed the decisions of the lower courts and held that the "malprac-

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[5] App. 164,179. Appendix 164-201 contains a public campaign report on file with the Ohio Secretary of State, of which this Court may take judicial notice. *See, e.g., Massachusetts* v. *Westcott*, 431 U.S. 322, 323 n.2 (1977). The dinner attracted contributions totaling approximately $47,000. (App. 164.) The dinner could only have been held for purposes of the Chief Justice's political campaign. Fund-raising for a *judicial* campaign in Ohio is restricted to 120 days before or after the election and may only be carried out by a single committee. *See* Ohio Code of Judicial Conduct, Canon 7(B). The fund-raising dinner in April 1981 occurred more than 120 days after the Chief Justice's November 1980 election to a six-year term. The reports filed on behalf of the Chief Justice further show that his fund-raising efforts were carried out by at least four separate political committees. Thus, the restrictions applicable to judicial campaigns were not met with respect to the April 1981 dinner.

tice" statute of limitations for "hospital[s]" does not encompass the conduct of nurses and hospital laboratory technicians. (App. 124-25.) The court's decision was four-to-three, with Chief Justice Celebrezze in the majority.

In *Cincinnati Milacron,* plaintiffs below (also respondents here) had sought compensatory and punitive damages for illnesses allegedly suffered as a result of exposure to chemicals in the course of their employment by petitioner Milacron. The trial court granted a motion to dismiss the complaint on the ground that the Ohio Constitution and Ohio Workers' Compensation Act provided the exclusive remedy and precluded civil suit. (App. 28.) The Court of Appeals affirmed. (App. 32.)

On appeal to the Ohio Supreme Court, the *Cincinnati Milacron* case attracted significant attention from labor and business interests. The Ohio AFL-CIO—which for many years has been a major force in the state's politics—filed an *amicus curiae* brief (with the court's permission) on behalf of plaintiffs. It told the court:

> "Participation is desired because of the continuing interest and concern of the Ohio AFL-CIO with the laws of the State dealing with Ohio Workers' Compensation, which are directly affected by the issues presented in this case. The Ohio AFL-CIO has, over the years, been involved in extensive participation in testifying and lobbying legislation involving Workers' Compensation.
>
> "A substantial number of individuals who are members of Local Unions affiliated with the Ohio AFL-CIO are amenable to the Workers' Compensation Laws, and may be affected by the Court's decision herein." (App. 203.)

The AFL-CIO, together with other labor unions, had contributed at least $4,000 in 1981 to "advance the public image of Frank D. Celebrezze". (App. 164.)[6]

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[6] Contributions included: Ohio AFL-CIO, $100; Laborers International Union of North America, Local 310, $1,000; Firepac Local No. 93, $1,000; Ohio State Building and Construction Trades Coun-

On March 3, a week after the Chief Justice's original "deadline" for resigning had passed without a resignation, the Ohio Supreme Court ruled in favor of the plaintiff-workers in *Cincinnati Milacron* and reversed the lower courts by a judgment announced with: (i) an opinion for the court; (ii) two concurring opinions; (iii) one opinion concurring in part and dissenting in part; and (iv) two dissenting opinions.

The Chief Justice filed one of the concurring opinions in the case. That opinion is reproduced at App. 18-19. The opinion carries the unmistakable ring of political speechmaking. In it, the Chief Justice described the dissent as "an enemy of all workers," as champions of "a 19th century 'robber baron' " position, and as "remarkably insensitive to the particularly egregious behavior on the part of employers . . . which the state has an interest in preventing." (App. 18.) The Chief Justice also accused petitioner of "fraudulently misrepresenting or concealing workplace hazards" (App. 18), despite the fact that the case below had been dismissed on the pleadings and there had not yet been any hearing on the merits. The Chief Justice's opinion concluded:

> "The bottom line of this case is that prohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to 'cost-out' an investment decision to kill workers. *This abdication of employer responsibility, as represented by the dissenters, is an affront to the dignity of every single working man and working woman in Ohio.*" (App. 19; emphasis added.)

3. The Denial of Rehearing in *Minster Machine* and *St. Vincent Hospital*

On March 8, the defendants in *Minster Machine* and *St. Vincent Hospital* (petitioners here) filed timely motions for

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cil—Educational Fund, $200; Laborers International Union of North America, $200; United Auto Workers Ohio State Political Action Committee, $1,000; Cleveland Building and Construction Trades Council, $200; Carpenters District Council, $500; Cincinnati AFL-CIO Labor Council, $100; Columbus Building and Construction Trades Council, $100." (App. 164-201.)

rehearing. These motions, in largely identical language, claimed that a failure to grant rehearing because of the Chief Justice's participation after he had become a candidate for Governor "will result in violations of [petitoners'] rights under the ... Fourteenth Amendment of the United States Constitution", in that petitioners have been "deprived of [their] right to due process of law". (App. 117, 119, 156-57.)[7]

Ordinarily, opposing counsel would have had five days to submit briefs in opposition to motions for rehearing. (Rules of Practice of the Supreme Court of Ohio, Rule IX, 25 Ohio Rev. Code Ann. 100 (Page 1981).) But within hours after the motions were filed in these cases, the Chief Justice personally telephoned counsel for petitioners and advised them to be in Columbus for a proceeding before the full court the next day, March 9, 1982. The Chief Justice refused to explain what the nature of the proceeding was to be and stated that he did not want opposing counsel present. Such a proceeding is wholly unprecedented in the experience and knowledge of counsel for petitioners.

Counsel for petitioners attended the proceeding on March 9, 1982. Counsel for respondents were not present and no record was made. The proceeding was held in the court's conference room (again, an unprecedented event, in counsel's experience). Some members of the court: (i) questioned the ethical propriety of raising the Chief Justice's participation as a basis for the motion for rehearing; and (ii) suggested that petitioners should present their federal constitutional claims directly to the United States Supreme Court.[8]

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[7] Petition for rehearing was the first state procedure available for raising petitioners' constitutional claims. Ohio's judicial disqualification statutes do not apply to the State's Supreme Court Justices. *See* Ohio Rev. Code Ann. §§ 2101.39, 2501.13, 2701.03, 2937.30 (Page 1981).

[8] One member of the court said that the issues raised by the motions for rehearing were not in any way improper; some other members sat mute during the proceeding.

That same day, March 9, without waiting for opposing papers, rehearing was denied in both cases without opinion. The Chief Justice did not disqualify himself from participation in the court's denial of rehearing. (App. 103,143.)

Also on March 9, the Chief Justice submitted his formal resignation to the Governor, to take effect on Monday, March 15. The Chief Justice then left Columbus to attend a planned campaign fund-raising dinner for him in Parma, Ohio. (App. 210.)[9]

4. The Chief Justice's Termination of His Candidacy and The Denial of Rehearing in *Cincinnati Milacron*

On March 10, 1982, Chief Justice Celebrezze suddenly ended his gubernatorial candidacy and withdrew his March 9 resignation from the Ohio Supreme Court. According to press reports, the Chief Justice stated that a financial supporter who had promised to raise or donate $100,000 of the $750,000 needed for his campaign had withdrawn support. (App. 213.)

On March 15, 1982, petitioners filed a timely motion for rehearing in *Cincinnati Milacron* which claimed, *inter alia*, that the Chief Justice's participation in the decision after he became a gubernatorial candidate "deprive[d] Appellees of their right to due process guaranteed by the Fourteenth Amendment of the United States Constitution". (App. 64.) The motion for a rehearing was denied on April 7, 1982, without opinion; the Chief Justice is not recorded as disqualifying himself from participation in that decision. (App. 42.)

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[9] Appendix 210-214 contains two newspaper articles, dated March 11, 1982, reporting the Chief Justice's resignation and the subsequent withdrawal of his resignation. These articles appeared after the petitions for rehearing were filed in *Minster Machine* and *St. Vincent Hospital* and could not, therefore, have been made part of the record below. In any event, the fact of the Chief Justice's resignation (as well as his later withdrawal of it) is not a matter subject to dispute between the parties.

REASONS WHY THE WRIT SHOULD BE GRANTED

The writ should be granted here because:

1. The Ohio Supreme Court's actions below conflict with *Tumey v. Ohio* and its progeny and deprive petitioners of their due process right to a hearing before a fair and impartial tribunal—a tribunal whose decisionmaking is not in fact or appearance tainted by the partisan political needs of its chief judicial officer.

2. The Ohio court's actions capriciously and unfairly deny to petitioners a fundamental right which the State's Judicial Code extends to every other litigant in the State: the right to hearings before judges who are not engaged in partisan political campaigns and who cannot weigh or appear to weigh their political campaign necessities in the balance of their judicial decisions.

3. The constitutional question whether judges are required to resign from their judicial positions or otherwise refrain from judicial decisionmaking once they become partisan political candidates is an important one and one on which petitioners manifestly did not have a fair hearing in the court below.

1. The Decisions Below Conflict with *Tumey v. Ohio* and the Due Process Standard for Fair and Impartial State Tribunals

The right to a fair and impartial tribunal is the most fundamental constitutional right of any litigant in any court. Even "the appearance of evenhanded justice" is "at the core of due process". *Mayberry v. Pennsylvania,* 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

The fountainhead for the Court's Fourteenth Amendment holdings in this area is the unanimous decision in *Tumey v. Ohio,* 273 U.S. 510 (1927). The Court there found that a mayor's small "direct, personal, pecuniary interest in convicting

the defendant" violated due process. (*Id.* at 523, 531-532.) The court further found:

> "But the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here." (*Id.* at 532.)

The Court looked to the mayor's interest "in the financial condition of the village, and his responsibility therefor" and queried: "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?" (*Id.* at 533.) The Court thus held: "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." (*Id.* at 534.)

The constitutional standard formulated in *Tumey* was this:

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (*Id.* at 532.)

This constitutional standard has since been applied to state civil and administrative proceedings as well as to criminal trials[10] and has been extended repeatedly beyond immediate

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[10] *See, e.g., Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471, 485-486 (1972); *Johnson* v. *Mississippi*, 403 U.S. 212, 215-216 (1971); *In re Murchison*, 349 U.S. 133, 136-139 (1955); *see also Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

financial interests, to the "various situations . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable". *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).[11]

In all of these cases, the Court has consistently looked to what "in the very nature of things" or as a "practical matter" may create the seeds or probability of prejudice or impermissible interest. (*In re Murchison, supra*, 349 U.S. at 137-138.)

The actions of the Ohio Supreme Court in the cases here flatly conflict with this constitutional standard. By permitting its Chief Justice to sit and decide cases after he was a candidate for Governor, the Ohio court—

> (a) tolerated a financial interest that beyond argument "would offer a possible temptation to the average man as a judge. . . which might lead him not to hold the balance nice, clear and true. . . ."; and
>
> (b) acquiesced in the joinder of "practically and seriously inconsistent positions, one partisan and the other judicial, [which] necessarily involves a lack of due process. . . ." (*Tumey*, 273 U.S. at 532, 534.)

We consider these two issues separately.

a. *The Chief Justice's Impermissible Financial Interest*

Political campaigns today require enormous sums of money. These sums are "an ever more essential ingredient of an effective candidacy". *Buckley v. Valeo*, 424 U.S. 1, 26 (1976)

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[11] *See, e.g., Morrissey* v. *Brewer, supra*, 408 U.S. at 485-486 (where the parole officer's involvement with parolee meant that the former "cannot always have complete objectivity"); *Taylor* v. *Hayes*, 418 U.S. 488, 501-503 (1974) (where a judge has been the target of personal abuse and criticism from the party before him); *Ward* v. *Village of Monroeville, supra*, 409 U.S. at 58 (where village income was derived from fines imposed by the mayor in his "mayor's court", although the mayor himself did not receive the fines).

(per curiam). What the need for these large sums means as a practical matter is that candidates simply cannot afford to divorce what they say or do from its effect on their campaign fund-raising.

Judges who become partisan political candidates are in no sense immune from these financial pressures. There is utterly no constitutional warrant to treat them differently and hold that they will be disinterested in how their actions on the bench may affect their ongoing political campaigns and their financial supporters.

In applying the Fourteenth Amendment's due process standard, this Court has found impermissible a judicial officer's financial gain of only $5, *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam), and has held that even where no money was received personally, a judge's interest as mayor in enhancing his town's finances rendered him unfit to act impartially in traffic cases involving fines of only $50. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

If those cases are good law, then petitioners are entitled to the writ here. The Ohio Chief Justice—as a candidate for Governor—stood to gain or lose hundreds of thousands of dollars depending on how his judicial actions affected his campaign. In at least two of the cases presented here, campaign contributors filed *amicus* briefs on the merits against petitioners. (*See* pages 7-8, 9 above.) And in the *Cincinnati Milacron* case, the *amicus* was the AFL-CIO, an organization with immense influence in Democratic Party politics in Ohio. It simply cannot be said that the Chief Justice, as a Democratic gubernatorial candidate, had no "possible temptation" to decide in favor of the AFL-CIO's position in the hope of attracting campaign money.

And even if the Ohio Chief Justice was in fact unaware of the particular campaign contributions by the *amici* below (petitioners only learned of them after rehearing was denied in these cases), there still remains the impermissible probability

that he—or any judge who becomes a partisan political candidate—may allow his judicial decisions to be affected by his need for campaign funds. That probability alone is sufficient to invoke Fourteenth Amendment protection. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *Ward v. Village of Monroeville*, 409 U.S. at 60; *Mayberry v. Pennsylvania, supra*, 400 U.S. at 463-66; *In re Murchison, supra*, 349 U.S. at 136. *Cf. Offutt v. United States*, 348 U.S. 11, 14-15 (1954). And there can be no question that that probability exists—common sense tells us so, and common sense is confirmed by the existence of the Judicial Codes in virtually every state of the union outlawing precisely that danger. (*See* page 18 below and App. 215-18.)

b. The Chief Justice's Impermissible Position as a Political Candidate

Even if politics were costless and candidacies free-of-charge, petitioners' Fourteenth Amendment rights would have been violated by the Ohio Chief Justice's participation in their cases after he became a gubernatorial candidate.

As this Court held in *Tumey*:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law. . . ." (273 U.S. at 534.)

Being a candidate for Governor of Ohio is every bit as inconsistent with the impartiality required of a judge as being the mayor of North College Hill, Ohio or of Monroeville, Ohio. (*Id.* at 515; *Ward v. Village of Monroeville.*) Such a candidacy creates precisely the kind of strong "motive to help", the kind of "partisan" responsibilities, that render political incumbents constitutionally unfit to be fair and impartial judicial decisionmakers. (*Tumey*, 273 U.S. at 533; *Ward*, 409 U.S. at 60.)

In the *Cincinnati Milacron* case, for example, the Chief Justice—a Democratic gubernatorial candidate—had to decide

as judge between conflicting claims of labor and business litigants in a case involving: (i) politically volatile allegations of intentional conduct that resulted in the poisoning of workers; (ii) the basic reach of Ohio's Workmen's Compensation laws; and (iii) the AFL-CIO, which had come out publicly as *amicus* on the side of the workers. The issues at stake in the case affected virtually every employer in the State and most employees. In such a context, the Chief Justice, as a practical matter, "perforce occup[ied] two practically and seriously inconsistent positions, one partisan and the other judicial". (*Tumey*, 273 U.S. at 534.)

The rhetoric of the Chief Justice's concurring opinion in *Cincinnati Milacron* suggests that he in fact did mix his two inconsistent positions: calling the dissent "an enemy of all workers", and "an affront to the dignity of every single working man and working woman in Ohio" is the language of a politician, not a judge. (433 N.E.2d 572, 578-79; App. 18-19.) And imposing a "personal" deadline for deciding cases so that he could free himself to campaign full-time is similarly the conduct of a politician, not a court.

These actions may not have been consciously motivated by the Ohio Chief Justice's political necessities. But whether they were in fact or not does not control. What does control is *first*, that no court may, consistent with the Constitution's due process standard, presume that judges who are partisan political candidates will be indifferent to the necessities of their campaigns while on the bench. And *second*, that the appearance and probability of interest or bias by judges who are such candidates is sufficient to invoke Fourteenth Amendment protection.

The Judicial Codes for forty-eight states and the District of Columbia, the ABA Code of Judicial Conduct and the Code of Judicial Conduct for United States Judges all recognize the inherent inconsistency between judicial decisionmaking and partisan political candidacies. (*See* App. 215-18.) For over half a century, beginning with the ABA Canons adopted in 1924, and continuing in the Judicial Codes of today, the

judgment of this country's bar and of virtually every state has been that judges must resign their judicial position when they become candidates for partisan political office.[12] That judgment is a reflection both of the realities of political campaigns and of the due process standard announced by this Court in *Tumey*.

c. ***The Chief Justice's "Inactive" Candidacy is Constitutionally Impermissible***

During one of the press conferences held by the Chief Justice when he announced his gubernatorial candidacy, he reportedly said that he would make no more political statements before he resigned his judicial office. (App. 121.) Presumably, the Chief Justice concluded, with his court's assent, that such an arrangement would satisfy both Ohio's Judicial Code and petitioners' federal due process rights.

This arrangement, however, satisfies neither, for at least these reasons:

First, the Chief Justice did not halt all campaign activity during his self-imposed interregnum. Plainly, fund-raising activities and other campaign efforts went forward. Indeed, a fund-raising dinner was held on the very night the Chief Justice ultimately resigned. (App. 121, 210, 213.)

Second, the very act of "doing everything I can to expedite" the court's pending cases so that he could meet his "personal deadline" for resigning (App. 161) is the act of a political candidate, not a Chief Justice.

Third and most important: one cannot contend that the formal announcement of a gubernatorial candidacy is a matter of indifference to the candidate. Many people may be rumored to be candidates or may "test the waters" through receptions or dinners. But once a formal announcement is made, a person cannot help but assume the role of candidate. Plans must be

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[12] "One area of activity which has by common consent been clearly defined as being out of bounds for a judicial officer is the area of partisan political activity." Rifkind, *A Judge's Nonjudicial Behavior,* 37 N.Y. State Bar J. 22, 24 (1966).

made by the candidate himself or on his behalf. Campaign resources must be found and marshalled. Issues have to be considered and the like.

Nor may it be said that the announcement of Chief Justice Celebrezze's candidacy was merely to "test the waters". On the contrary, the avowed "purpose of [the] statement [was] to acknowledge my awareness of public speculation concerning my becoming a candidate for Governor of Ohio in the forthcoming Democratic Primary. *I will be a candidate for governor.*" (App. 161; emphasis added.)

To say one may announce a gubernatorial candidacy with a flourish of campaign rhetoric and press conferences around the state and then proceed as if the announcement never took place is to indulge in the kind of fiction this Court has never tolerated in its due process decisions. *See, e.g., Morrissey v. Brewer, supra,* 408 U.S. at 485-486.

2. The Decisions Below Deny Petitioners Equal Protection of Law

The Code of Judicial Conduct of Ohio—promulgated by the Ohio Supreme Court under its state constitutional mandate—guarantees to all litigants in the state the right to hearings before judges who are not candidates for political office.

Petitioners were deprived of that right by the Ohio Chief Justice's participation in their cases, in violation of the Fourteenth Amendment's guarantee of equal protection and due process of law.

a. *The State-Created Right at Issue Here*

Canon 30 of the Canons of Judicial Ethics, adopted by the Ohio Supreme Court in 1954, required that a judge who becomes a political candidate resign. *See* 176 Ohio St. lxxvii, lxxxiv (1964). Canon 7(A)(3) of the Ohio Code of Judicial Conduct, which replaced Canon 30 in 1973, continued the resignation requirement. (36 Ohio St. 2d xix, xxxii (1974);

App. 2.) Under Ohio law, the Judicial Code is mandatory, not discretionary, and is binding upon all judicial officers, including supreme court justices. (*See* page 5 n.3 above.)

Ohio has long recognized the fundamental importance of this right. In 1958, for example, the Ohio Supreme Court upheld the suspension from the practice of law of a lower court judge who became a political candidate and refused to resign. *Mahoning County Bar Association v. Judge Franko,* 168 Ohio St. 17, 151 N.E.2d 17 (1958), *cert. denied,* 358 U.S. 932 (1959). The court there stated that people in the state "have a right to expect" that their judges, once elected to the judiciary, will "remain outside and distinct from the 'mainstream' of partisan politics" in order to insure the judiciary's "independence, impartiality and freedom from bias, prejudice and pressure . . . ." (*Id.,* 151 N.E.2d at 25.) The court explained that Canon 30's requirements that a judge resign when he becomes a political candidate

> "are not merely arbitrary rules of conduct laid down by this court, but are requirements bottomed on the premise that the judiciary of the State of Ohio shall be kept as far as possible from the 'mainstream' of partisan politics, all things considered, and that the resignation of a judge who becomes a candidate for a nonjudicial office is a reasonable measure designed to preclude the possibility of the intrusion of partisan politics into the administration of justice and to preclude even the suspicion of such intrusion, which would normally attach to every ruling a judge who retains the bench while a candidate for a nonjudicial office might make, *regardless of his intent or the soundness or justice of such ruling."* (*Id.*) (Emphasis by the court.)

b. *The Arbitrary and Discriminatory Denial of that Right Below*

This Court has repeatedly held that once a state posits a right on behalf of its citizens, the Equal Protection Clause of the Fourteenth Amendment prevents the state from denying that

right to some citizens without a constitutionally sufficient justification. *See, e.g., Mills v. Habluetzel,* 102 S. Ct. 1549, 1551, 1553 (1982); *Gomez v. Perez,* 409 U.S. 535, 538 (1973); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Thus, for example, although the Constitution may not in and of itself require a state to provide appellate review of trial court judgments, once a state does grant the right to such review, it may not deny that right to some in the absence of constitutionally sufficient reasons. *Griffin v. Illinois, supra.*

Given the vital importance of fairness and impartiality and the appearance of both in state judicial proceedings, a demanding equal protection standard is appropriate here. But the Ohio Supreme Court's actions below fail to meet *any* of the standards of inquiry under the Equal Protection Clause: Chief Justice Celebrezze's participation in the cases pending when he became a candidate for Governor furthered no legitimate interest of the State.

The Chief Justice's participation cannot be said to have furthered any State interest in judicial efficiency or economy. As noted, the Chief Justice's participation in the decisions handed down between January 15 and March 9 was unnecessary. (*See* pages 6-7 above.) The Ohio Supreme Court was empowered by the State constitution to decide the pending cases with its six remaining justices and in fact did so in other cases in that same period. The Court was also empowered to appoint a court of appeals judge to sit in the Chief Justice's place (Ohio Const. art. IV, § 2(A)) and in fact did just that in another case decided on March 9, 1982, the very day rehearing was denied in *Minster Machine* and *St. Vincent Hospital.* (*See* page 7 n.4 above.) Some reargruments may have had to be held in the Chief Justice's absence. But the marginal cost in terms of the judicial effort required by any such reargruments can hardly be considered sufficient to justify a denial of petitioners' rights under the State's mandatory Judicial Code Canon 7(A)(3).

See, e.g., Mills v. Habluetzel, 102 S.Ct. 1549, 1555 (1982); *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972); *Reed v. Reed,* 404 U.S. 71, 76 (1971); *Carrington v. Rash,* 380 U.S. 89, 96 (1965).

The only other possible justifications for the court's actions below are equally insubstantial or outright impermissible. To the extent the court sought to accommodate the Chief Justice's political time-table or his campaign needs or his personal desire to avoid the appearance of leaving the court "in the lurch"—those justifications are plainly insufficient, if permissible at all, when set against the important state-created right to be heard by judges who "must remain outside and distinct from the 'mainstream' of partisan politics". (*Mahoning County Bar Association v. Judge Franko, supra,* 151 N.E.2d at 25.)

In sum: the Ohio Supreme Court has effectively ruled that every litigant in the State is entitled to the protection of Ohio Judicial Code Canon 7(A)(3) *except* those litigants whose cases happen to have been decided by that court between January 15 and March 9, 1982.

That ruling is unfair and capricious. It has deprived petitioners of an important state-created right in violation of the Fourteenth Amendment guarantees of equal protection and due process of law.

3. The Importance of the Questions Presented and the Conduct of the Ohio Court Below Require that the Writ Be Granted

There are no questions more worthy of this Court's time and attention than questions which go to the basic fairness and impartiality of the country's judicial system, state and federal. People have the fundamental right to expect that when they come before this country's courts the judges will not be biased or prejudiced or decide cases for reasons of partisan politics. The expectation and the strictures of impartiality lie at the very core of what distinguishes courts of law from the political world.

Petitioners believe with reason that they have not had a hearing before an impartial court. This federal claim is important and substantial—and, manifestly, petitioners have not had a fair hearing on it below.

On or before January 15, the Ohio Supreme Court apparently decided that its Chief Justice could continue to sit despite his announced gubernatorial candidacy, despite Ohio's Judicial Code and despite the Fourteenth Amendment teachings of this Court, which the Ohio court is most certainly aware of. *See, e.g., Tumey v. Ohio; Ward v. Village of Monroeville.* The Ohio court went so far as to expedite its decisions on pending cases to help its Chief Justice meet his "personal" political deadline. Petitioners had no opportunity to address the court before it took these actions.

When petitioners raised their federal claim of unfairness—in the first procedure available to them—what they received in response was either a single word, "denied", or a summons to an unprecedented *in camera* proceeding where members of the court told them to take their federal claims to this Court.

Petitioners are now here. They deserve and are entitled to a hearing on the merits of their constitutional claim.

CONCLUSION

In rendering its final orders below, the Ohio Supreme Court disregarded its own procedures, its own Code of Judicial Conduct, the Codes of Judicial Conduct of 47 other states and this Court's Fourteenth Amendment teachings for the past half-century or more.

For these reasons—as set out above—petitioners ask that a writ of certiorari be granted.

Respectfully submitted,

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82-10

No.

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CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., ET AL.,
Petitioners,

—against—

EDWARD BLANKENSHIP, ET AL.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITZ,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER
and ELLA AMBATS,
Petitioners,

—against—

ADELINE T. ZAK and THADDEUS O. ZAK,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF JUDICIAL CONDUCT

AS ADOPTED BY THE SUPREME COURT OF OHIO

Effective December 20, 1973

Preface

This Code, consisting of statements of norms denominated cannons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated.

• • • •

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or preside at a political meeting or publicly endorse a candidate for public office;

COMMENTARY

A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(2) A judge holding office, or a candidate for such office, may attend political gatherings and may identify himself as a member of a political party. He may speak to such political gatherings on his own behalf when he is a candidate for election or re-election and contribute to a political party or organization only in the calendar year in which he is a candidate for election or re-election.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office:

(a) should maintain the dignity appropriate to judicial office;

(b) should prohibit public officials, appointees or employees subject to his direction or control from soliciting or accepting campaign fund contributions for him;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance

of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish a committee of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committee should not, directly or indirectly, solicit or receive any assessment, subscription, or contribution for any political or personal purpose whatever from any employee, appointee of the court or anyone who does business with the court but may solicit campaign contributions from lawyers. A candidate's committee may solicit funds for his campaign no earlier than 120 days before a primary election and no later than 120 days after the last election in which he participates during the election year.

(a) All campaign contributions and expenditures shall be solicited, accepted and expended by one and only one committee for each candidate. Such committee shall establish one and only one bank account and shall deposit all campaign contributions in that one account and all campaign expenditures shall be made by check from that account. The name and address of the committee chairman and the treasurer of the committee and of the bank in which the account is established shall be filed with the clerk of the court for which the person is a candidate for office within ten days after such committee is established.

(b) The treasurer of such committeee shall file a report of all contributions listing the name and address of each contributor and the amount of contribution and all expenditures listing the name and address of the person receiving such expenditures and the amount on the tenth day prior to both the primary and general elections and another report giving the same details not later than forty-five days subsequent to the date the primary and general

elections are held. In the event campaign contributions are accepted after the above report is filed, a final report shall be filed not later than 120 days after the general election. These reports shall be filed with the clerk of the court for which the person is a candidate for office. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

COMMENTARY

These restrictions shall not be interpreted to prohibit a civic organization, bar association or duly constituted and lawfully elected political party organization from raising funds and making expenditures in behalf of judicial candidates which it has decided to support. A candidate, including an incumbent judge, may appear before an editorial board of a newspaper or a screening committee of a civic organization, bar association or political organization for the purpose of seeking the endorsement or publicly stated support of the publication or organization.

(3) A candidate, including an incumbent judge, should not solicit or receive any assessment, subscription, or contribution for any political or personal purpose whatever from any employee, appointee of the court or anyone who does business with the court.

COMMENTARY

Appointees of the court include officials such as referees, commissioners, special masters, receivers, guardians, appraisers and personnel such as clerks, secretaries, bailiffs and all other employees and appointees.

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court

commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge.

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C, except that a part-time judge must file the annual disclosure statement required by R. C. 102.02;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore.

A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge.

A retired judge who is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G.

Effective Date of Compliance

This Code is hereby made effective December 20, 1973.

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. In any event a non-incumbent who has been elected to, is elected to, or has been or is appointed to a judicial position to which this Code is applicable shall fully and completely comply with the Code at the beginning of his term of office. An incumbent judge shall be in full compliance with all the provisions of this Code no later than the date upon which his next term of office begins.

Supreme Court of the United States

No. A-1021

CINCINNATI MILACRON CHEMICALS, INC., *Et Al.*,
Petitioners

v.

EDWARD BLANKENSHIP, *Et Al.*

and

MINSTER MACHINE COMPANY,
Petitioner

v.

VIRGINIA MAE KNITZ

and

ST. VINCENT HOSPITAL & MEDICAL CENTER AND ELLA AMBATS,
Petitioners

v.

ADELINE T. ZAK, *Et Al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time to file petitions for writs of certiorari by Minster Machine Company and St. Vincent Hospital & Medical Center and Ella Ambats be, and the same is hereby, extended to and including July 6, 1982.

IT IS FURTHER ORDERED that the application for an extension of time within which to file a petition for a writ of certiorari by Cincinnati Milacron Chemicals, Inc., et al. is denied.

/s/ SANDRA DAY O'CONNOR

Associate Justice of the Supreme
Court of the United States

Dated this 27th day of May, 1982.

SUPREME COURT OF OHIO

JANUARY TERM, 1982.

BLANKENSHIP ET AL., APPELLANTS, *v.*
CINCINNATI MILACRON CHEMICALS, INC., ET AL., APPELLEES.

[Cite as Blankenship v. Cincinnati Milacron Chemicals (1982), 69 Ohio St. 2d 608.]

Employer and employee—Liability of employer for intentional tort—Workers' Compensation Act not applicable, when.

An employee is not precluded by Section 35, Article II of the Ohio Constitution, or by R. C. 4123.74 and 4123.741 from enforcing his common law remedies against his employer for an intentional tort.

(No. 81-402—Decided March 3, 1982.)

APPEAL from the Court of Appeals for Hamilton County.

On February 22, 1979, appellants, eight current or former employees of Cincinnati Milacron Chemicals, Inc. (hereinafter Milacron), and where appropriate, their spouses, instituted an action in the Court of Common Pleas of Hamilton County seeking compensatory and punitive damages against their employer (Milacron) and several individual fellow employees, appellees herein.[1] Appellants alleged in their original and amended complaints that they were, at all times relevant, employed by Milacron as were the individual appellee fellow servants named herein. Appellants further alleged that while they were stationed at Milacron's chemical manufacturing facility in Reading, Ohio, they were exposed to the fumes and otherwise noxious characteristics of certain chemicals[2] within

[1] In their original complaint, appellants also named as defendants a number of unidentified chemical manufacturers and distributors. Subsequently, appellants' complaint was amended to specifically identify the chemical manufacturers and distributors.

[2] Specifically, the chemicals were methyl chloride, stannic chloride, tri methyl amine, and tin.

the scope of their employment which "rendered [them] sick, poisoned, and chemically intoxicated, [and] causing them pain, discomfort, and emotional distress which will continue for the indefinite future and causing suffering and permanent disability."

In pertinent part,[3] appellants further alleged in their complaint, that notwithstanding the knowledge of appellees that such conditions existed, the appellees "*** failed to correct said conditions, failed to warn *** [appellants]-employees of the dangers and conditions that existed and failed to report said conditions to the various state and federal agencies to which they were required to report by law." Appellants claimed that "[s]uch failure on the part of *** [appellees] was intentional, malicious and in willful and wanton disregard of the health of *** [appellants] and that "[a]s a direct and proximate result of this *** failure, *** [appellants] have been injured ***."

Appellants also asserted that, "[n]otwithstanding the knowledge of *** [appellees] that certain occupational diseases were being contracted, *** [appellees] failed to warn [appellant]-employees and failed to provide medical examinations as required by law." It is further alleged that these omissions and commissions by appellees "*** were intentional, malicious, and in willful and wanton disregard of their duty to protect the health of *** [appellants]," and that as a direct and proximate cause of this conduct, appellants were injured.[4]

It is undisputed that Milacron is a fully-covered, self-insured employer, in full compliance with all the requirements of the Ohio Workers' Compensation Act. R. C. 4123.01 *et seq.*

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[3] Two of the six causes of action asserted by appellants are directed at Milacron and the fellow employees, appellees herein. Causes of action one, two, and three of the amended complaint are directed against the manufacturers and distributors of the chemicals used by Milacron. These named manufacturers and distributors are not parties to this appeal and, as such, the claims against them are not relevant to the issue presented by this appeal.

[4] In the sixth cause of action, the spouses of appellants, were appropriate, asserted a claim against appelles herein for loss of consortium resulting from the alleged chemical intoxication of their respective spouses. This claim has not been raised on appeal to this court.

Subsequent to the filing of the original complaint and the amended complaint, appellees moved to dismiss the complaint pursuant to Civ. R. 12(B)(1) and (6). Citing Section 35, Article II of the Ohio Constitution, and R. C. 4123.74 and 4123.741, appellees asserted that the trial court lacked subject matter jurisdiction and that the complaint failed to state a cause of action upon which relief could be granted.

The trial court issued an order on October 5, 1980, which granted appellees' motion and dismissed the action with prejudice as to appellees on the ground that the action was barred by relevant sections of the Ohio Constitution and the Ohio Workers' Compensation Act which afforded an employer and his employees total immunity from civil suit. The trial court, being of the opinion that there was no just reason for delay, entered final judgment in favor of appellees on all claims.[5]

This holding was appealed and subsequently affirmed by the Court of Appeals on January 14, 1980. In holding that appellees are immune from liability for intentional tortious conduct, the court reasoned that the purpose of Section 35, Article II of the Ohio Constitution, was to abolish civil actions by employees against complying employers for work-related injuries. The court further found that this provision, as implemented by R. C. 4123.74, means that a court lacks jurisdiction to entertain a civil action for damages against an employer where an employee seeks to circumvent the exclusive nature of the workers' compensation scheme by alleging intentional conduct.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Kondritzer, Gold & Frank Co., L.P.A., Mr. William E. Clements, Jerald D. Harris Co., L.P.A., and *Mr. Jerald D. Harris*, for appellants.

Messrs. Taft, Stettinius & Hollister and *Mr. Gerald J. Rapien*, for appellees.

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[5] Appellants' action against the chemical manufacturers and distributors is still pending.

WILLIAM B. BROWN, J. The sole issue raised in this appeal is whether the trial court properly granted appelles' motion to dismiss appellants' complaint on the grounds that an employee is barred by Section 35, Article II of the Ohio Constitution, and R. C. 4123.74 and 4123.741 from prosecuting an action at law for an intentional tort.

At the outset, it must be remembered that the appellants are appealing from an order granting a motion to dismiss pursuant to Civ. R. 12(B)(1) and (6). In *O'Brien* v. *University Community Tenants Union* (1975), 42 Ohio St. 2d 242, this court stated that "[i]n order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ. R. 12[B][6]), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. (*Conley* v. *Gibson*, 355 U. S. 41, followed.)" And, in *Steffen* v. *General Telephone Co.* (1978), 60 Ohio App. 2d 144, 145, it was stated that, in considering a motion which claims lack of jurisdiction over the subject matter (Civ. R. 12[B][1]), "a similar principle controls: * * * the question is whether the plaintiff has alleged any cause of action cognizable by the forum."

Thus, the purpose of this appeal is not to try the factual issues presented by this complaint, but rather to determine whether the facts alone are sufficient to withstand a motion based on Civ. R. 12(B)(1) and (6). After carefully reviewing the complaint and seriously considering the arguments presented, this court, for the reasons stated hereinafter, finds that the complaint in question is sufficient to withstand such a challenge.

The primary focus of the dispute between the parties centers upon the question of whether the Workers' Compensation Act (R. C. 4123.35 *et seq.*) is intended to cover an intentional tort committed by employers against their employees. Section 35, Article II of the Ohio Constitution, serves as a basis for legislative enactments in the area of workers' compensation by providing, in pertinent part:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. * * * "

The constitutional mandate has been implemented by R. C. 4123.74 which provides:

"Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, *received or contracted by any employee in the course of or arising out of his employment* * * * whether or not such injury, occupational disease [or] bodily condition * * * is compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code." (Emphasis added.)[6]

Clearly, neither the relevant constitutional language nor the pertinent statutory language expressly extend the grant of immunity to actions alleging intentional tortious conduct by employers against their employees. The General Assembly, however, in enacting R. C. 4123.95, established a rule of

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[6] The emphasized language was added to the statute in 1959. (128 Ohio Laws 743, 770.)

R. C. 4123.741 is also relevant to the resolution of this case. That section provides that:

"No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment, * * * on the condition that such injury, occupational disease or death is found to be compensable under sections 4123.01 to 4123.94, inclusive of the Revised Code."

construction which is clearly of assistance in determining the scope of employer immunity. This section provides that:

"Sections 4123.01 to 4123.94, inclusive, of the Revised Code, shall be liberally construed in favor of employees and the dependents of deceased employees."

It is with this requirement in mind that we address the language in R. C. 4123.74. The emphasized language in R. C. 4123.74 quoted above, as was noted in *Delamotte* v. *Midland Ross* (1978), 64 Ohio App. 2d 159, 161, " * * * clearly limits the categories of injuries for which the employer is exempt from civil liability." By designating as compensable only those injuries " * * * received or contracted * * * in the course of or arising out of * * * employment * * * ," the General Assembly has expressly limited the scope of compensability. In so doing, the General Assembly surely did not intend to remove all remedies from the employee whose injury is not compensable under the Act.[7] And, by its use of this phrase, the General Assembly has seemingly allowed the judiciary the freedom to determine what risks are incidental to employment in light of the humanitarian purposes which underlie the Act.

In this regard, this court further agrees with the *Delamotte* court that where an employee asserts in his complaint a claim for damages based on an intentional tort, " * * * the substance of the claim is not an 'injury * * * received or contracted by any

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[7] As was stated in *Mercer* v. *Uniroyal, Inc.* (1976), 49 Ohio App. 2d 279, 285, "* * * [w]hen the initiating cause is not a hazard of employment, there is no causal connection between the employment and the injury."

Thus, at some point, the employment relationship terminates and the intentionally inflicted injury cannot be considered compensable under a system that has been promulgated to insure against accidents which occur within the scope of employment.

Appellees cite *Greenwalt* v. *Goodyear Tire & Rubber Co.* (1955), 164 Ohio St. 1, as authority for their position. This case is, however, factually distinguishable. The intentional misconduct of the employer in *Greenwalt* amounted to fraud perpetrated toward the employee that deprived the employee of workers' compensation benefits. Whereas the intentional conduct in *Greenwalt* involved omission, the intentional conduct alleged herein involved commission. Here, the employees allegedly suffered direct physical harm as a result of the alleged intentional torts of their employer.

employee in the course of or arising out of his employment' within the meaning of R. C. 4123.74 * * * ." *Id.* No reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee nor would such individual contemplate the risk of an intentional tort as a natural risk of employment.[8] Since an employer's intentional conduct does not arise out of employment, R. C. 4123.74 does not bestow upon employers immunity from civil liability for their intentional torts and an employee may resort to a civil suit for damages. Accord *Barley* v. *Harrison Manufacturing* (No. E-80-75, May 22, 1981), Sixth District Court of Appeals, unreported; *Pariseau* v. *Wedge Products, Inc.* (No. 43195, May 7, 1981), Eighth District Court of Appeals, unreported.[9]

This holding not only comports with constitutional and statutory requirements, but it is also consistent with the legislative goals which underlie the Workers' Compensation Act.

The workers' compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses

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[8] In *Toth* v. *Standard Oil Co.* (1953), 160 Ohio St. 1, 5, this court stated that "injury" as used in the Ohio Workers' Compensation Act, comprehends a physical or traumatic damage or harm, accidental in its character in the sense of being unforeseen, unexpected and unusual.

An intentional tort, then, is clearly not an "injury" arising out of the course of employment. This very point was recognized in *Boek* v. *Wong Hing* (1930), 180 Minn. 470, 231 N.W. 233, wherein it was stated, at page 471, that it would be a "perversion of" the Workmen's Compensation Act's purpose to allow employers immunity from intentional torts. Indeed, it would be travesty on the use of the English language to allow someone who intentionally inflicts an injury on another to call the injury a work incident.

[9] See, also, *Boek* v. *Wong Hing, supra; Artonio* v. *Hirsch* (1957), 163 N.Y. Supp. 2d 489, 3 A.D. 2d 939; *Cohen* v. *Lion Products Co.* (D.C. Mass. 1959), 177 F. Supp. 486; *Skelton* v. *W. T. Grant Co.* (C.A. 5, 1964), 331 F. 2d 593; 2A Larson, Workmen's Compensation Law 13-1, Section 68.

and are protected from unlimited liability.[10] But the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct.[11] Indeed, workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act.

It must also be remembered that the compensation scheme was specifically designed to provide less than full compensation for injured employees.[12] Damages such as pain and suffering and loss of services on the part of a spouse are unavailable remedies to the injured employee. Punitive damages cannot be obtained. Yet, these damages are available to individuals who have been injured by intentional tortious conduct of third parties, and there is no legitimate reason why an employer should be able to escape from such damages simply because he committed an intentional tort against his employee.

In addition, one of the avowed purposes of the Act is to promote a safe and injury-free work environment. (R. C. 4101.11 and 4101.12.)[13] Affording an employer immunity for

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[10] 2A Larson, Workmen's Compensation Law 12-1, Section 65.10, at 12-4.

[11] As was stated in *Mandolidis* v. *Elkins Industries, Inc.* (W. Va. 1978), 246 S.E. 2d 907, 913:

"The workmen's compensation system completely supplanted the common law tort system only with respect to *negligently* caused industrial accidents, and employers and employees gained certain advantages and lost certain rights they had heretofore enjoyed. Entrepeneurs were not given the right to carry on their enterprises without any regard to the life and limb of the participants in the endeavor and free from all common law liability." (Emphasis *sic.*)

[12] This court stated in *State, ex rel. Crawford* v. *Indus. Comm.* (1924), 110 Ohio St. 271, 275, that:

"* * *[Workers' Compensation] was never intended by the most ardent advocates of * * * [it] to give full and adequate remuneration, because this would remove much of the inducement of * * * [workers] to exercise care and caution on their own part."

[13] Not only is an employer required to provide a safe workplace under Ohio law but under federal law, no employee may be discriminated against because he refuses to work when he has a reasonable belief that his health and safety are in jeopardy. See *Whirlpool Corp.* v. *Marshall* (1980), 445 U.S. 1.

his intentional behavior certainly would not promote such an environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly.

Moreover, as this court noted in *State, ex rel. Crawford,* v. *Indus. Comm.* (1924), 110 Ohio St. 271, 274, workers' compensation "* * * is founded upon the principle of insurance * * *."[14] An insurance policy does not protect the policy holder from the consequences of his intentional tortious act. Indeed, it would be against public policy to permit insurance against the intentional tort. See, generally, *Northwestern National Cas. Co.* v. *McNulty* (C.A. 5, 1962), 307 F. 2d 432.

The use of the element of intent in workers' compensation is in no way novel. Under R. C. 4123.54, an employee is denied benefits when he inflicts an injury upon himself intentionally. This section thus illustrates that intent plays an important role in the determination of whether an injury is compensable.

In conclusion, it is for the trier of fact to initially determine whether the alleged conduct constitutes an intentional injury. In the instant case, the facts will demonstrate whether an intentional tort occurred or whether the injuries received by appellants were incurred in the course of and arising from appellants' employment such that the worker's compensation remedy would be exclusive. These questions of fact, however, are not properly determinable by a Civ. R. 12(B)(6) motion to dismiss, for the lower court had before it insufficient facts to determine as a matter of law that appellants' complaint was barred. Appellants should be given an opportunity to prove their allegations that their employer committed an intentional tort causing them injury.

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and this cause is remanded for further proceedings according to law.

Judgment reversed.

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[14] See, also, R. C. 4123.29.

CELEBREZZE, C. J., SWEENEY and C. BROWN, JJ., concur.

LOCHER, J., concurs in part and dissents in part.

HOLMES and KRUPANSKY, JJ., dissent.

CELEBREZZE, C. J., concurring. I enthusiastically agree with the syllabus, content and conclusion of the majority opinion that workers injured by an employer's intentional or malicious action may sue the employer for common law damages and that the Workers' Compensation remedy is not the exclusive avenue open to employees seeking redress for injuries arising out of workplace hazards.

I am troubled by the language in the dissenting opinions that workers who are intentionally chemically poisoned on-the-job should not be able to recover damages from their employers because the elimination of health risks would cost too much money, thus decreasing the profits of corporations. I submit that anyone who believes that injuries or death from gases, fumes, impure air or dust should not be eliminated because a manufacturer will suffer a competitive disadvantage is an enemy of all workers. The dissenters' position is one that I would expect to be championed by a 19th century "robber baron," not a justice of this court who is duty-bound to serve all the people of Ohio.

The minority opinions are remarkably insensitive to the particularly egregious behavior on the part of employers—fraudulently misrepresenting or concealing workplace hazards—which the state has an interest in preventing. Indeed, under the theory articulated by the dissenters, an employer could intentionally cause an employee to suffer disability or death and, yet, remain immune from tort liability.

Recently, Ohio lawyers were chastised in the following fashion:

"* * * May I suggest that anyone attempting the noble practice of law first arm himself with the knowledge of how to

read, to understand that which he reads, then read the rules and cases which pertain to his problem before he embarks upon his voyage. These few simple requirements are not too much to expect of an individual who designates himself as an attorney at law and who is ready, willing and able to accept retainers for his services. If these simple rules are followed the bogeymen and hobgoblins who seek to undermine his endeavors will all disappear and he will emerge unscathed and a better attorney." *DeHart* v. *Aetna Life Ins. Co.* (1982), 69 Ohio St. 2d 189 (Krupansky, J., dissenting opinion at page 201.)

In paraphrasing the foregoing quotation, may I suggest that anyone answering the noble calling of the judiciary first arm himself or herself with the knowledge of how to read, to understand that which he or she reads, then read the cases which pertain to the problem before embarking upon the voyage. Even a superficial perusal of the current literature, cases and commentaries would demonstrate to the casual reader, unless he or she were living on Fantasy Island, that toxic fumes and chemicals in the workplace are genuine health hazards to many workers. See Kutchins, The Most Exclusive Remedy Is No Remedy At All: Workers' Compensation Coverage for Occupational Diseases, 32 Labor L. J. 212 (1981); 82 American Jurisprudence 2d, Workmen's Compensation, Section 303. See, generally, *Whirlpool Corp.* v. *Marshall* (1980), 445 U. S. 1.

The bottom line of this case is that prohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to "cost-out" an investment decision to kill workers. This abdication of employer responsibility, as represented by the dissenters, is an affront to the dignity of every single working man and working woman in Ohio.

SWEENEY and C. BROWN, JJ., concur in the foregoing concurring opinion.

CLIFFORD F. BROWN, J., concurring. The decision in this case reflected in the thorough analysis by Justice William B. Brown and the perspicacity displayed by Chief Justice Cele-

brezze in his concurring opinion, establishes that this court has not yet reached a state of institutionalized impotence. Rather, it retains vitality and an appreciation of the need for the growth of the law[15] in the field of workers' compensation.

A decision other than that we reach today would not only reject the legislative mandate of liberal construction in favor of claimants, it would be a display of judicial anemia and necrosis. All law is justice, and justice is law. It is the adoption and promotion of what is good, and the avoidance of evil. Our construction of the law complies with this definition of justice, while an opposite decision would constitute injustice.

Although the legal issue in this case is one of first impression for this court, the just result we reach merely adopts and amplifies the rule already recognized in Ohio in the well-reasoned opinion for a unanimous Sixth District Court of Appeals in *Delamotte* v. *Midland Ross* (1978), 64 Ohio App. 2d 159, and followed by the Sixth and Eighth District Courts of Appeal in *Barley* v. *Harrison Manufacturing* and *Pariseau* v. *Wedge Products, Inc.*, cited by the majority. The product of such experienced and well intentioned judicial minds of our appellate courts should not be given short shrift.

Furthermore, our decision in this case should be considered in light of the fact that for occupational diseases incurred in the work place, such as appellant's chemical poisoning, there is no workers' compensation paid unless there is total disability. R. C. 4123.68(BB) and (Y). *State, ex rel. Miller,* v. *Mead Corp.* (1979), 58 Ohio St. 2d 405.

This court has never yet ruled that an employer may intentionally harm an employee and remain immune to civil suit. Nor have we yet ruled that a fellow employee may

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[15] "[T]here can be no constancy in the law. * * * Law defines a relation not always between fixed points, but often, indeed oftenest, between points of varying position. The acts and situations to be regulated have a motion of their own. There is change whether we will it or not." Cardozo, The Paradoxes of Legal Science, page 11 (1928).

intentionally harm another employee with such impunity.[16] The legislature does not abrogate or change the common law, unless its statutory language is clear and concise and not subject to any other reasonable construction. *Triff* v. *National Bronze & Aluminum Foundry* (1939), 135 Ohio St. 191, 202. Accordingly, the common law right of action against an employer or fellow employee for intentional torts remains.

I note that the decision we reach today is attacked on the basis that "goods manufactured in this state will thereby suffer a competitive disadvantage, and a less hospitable climate is created to attract and maintain industry in this state." This is a scare tactic to create an illusion that industry will leave Ohio and establish itself in other states because Ohio does not grant immunity to employers who intentionally harm their employees. This tactic and illusion assumes without foundation

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[16] That no employer or fellow employee immunity exists for international harm to another employee is implied in our decision in *Landrum* v. *Middaugh* (1927), 117 Ohio St. 608, at page 615:

"Is the foreman, however, so merged with the employer, when acting within the scope of his employment, that the immunity of the employer from liability under the Workmens' Compensation Act also renders the forum immune?

"*That he is not merged with the employer in performing certain acts is evident.* If the foreman willfully, maliciously, or wantonly, in pursuance of his own unlawful purpose, injures a fellow employee, his act is not the lawful furtherance of the employer's business, under express authority of the employer, are the employer's acts. It is upon this theory that the employer is liable for the acts of the foreman done pursuant to and in the course of his employment. *Qui facit per alium facit per se. The acts which the foreman does in the course of his employment, without malice, wantonness, or willful intent, he would not do unless expressly authorized and ordered by his employer to do them.* * * * " (Emphasis added).

Landrum was reversed in *Gee* v. *Horvath* (1959), 169 Ohio St. 14, which permitted recovery by an employee in a suit against the foreman for his negligent act. The *Gee* decision was nullified in 1963 by the General Assembly's enactment of R. C. 4123.741 which provides that the employee is not liable for his negligence which results in injury to the fellow employee. It left undisturbed the *Landrum* statement implying that an employee is liable for his willful act injuring another employee.

that other states grant such immunity to employers who intentionally maim and kill their employees. Minnesota, New York, Massachusetts and West Virginia, as we have done here, do not grant such immunity. See footnotes 8, 9 and 11. The critics of our decision have not called attention to any other state that has granted such immunity to employers. Employers bent upon chemically poisoning their employees have no place to go in the United States to perform their perfidy with impunity.

The view expressed to support employer immunity is generated by greed to save a few dollars at the expense of chemically poisoned employees. It displays a brutal lack of compassion. It sends a message that dollars saved is more important than workers' lives.

Our enlightened decision in this case will serve as a good example to courts in other jurisdictions to adopt rules similar to ours, recognizing that it represents a refusal to revert to the Dark Ages of jurisprudence. Progress in workers' safety, which will be promoted by our decision, is as important as jobs for progress. Such workers' safety should rank higher on our scale of human values than that rallying cry and maxim: "Profit is not a dirty word in Ohio." What is good for workers is good for Ohio.

Finally, the prediction by appellees of excessive litigation accompanying every workers' compensation claim of import if immunity of the employer for intentional harm to employees is not established is irrelevant. "Dire predictions of excessive litigation and substantial liability always accompany any important decision * * *." *LeCrone* v. *Ohio Bell Telephone Co.* (1963), 120 Ohio App. 129, 138.

CELEBREZZE, C. J., and SWEENEY, J., concur in the foregoing concurring opinion.

LOCHER, J., concurring in part and dissenting in part. This cause arises on a motion to dismiss for lack of subject-matter jurisdiction, Civ. R. 12(B)(1), and for failure to state a claim upon which relief can be granted, Civ. R. 12(B)(6). I agree

with the syllabus as an abstract proposition of law. That is, intentional torts fall outside the workers' compensation scheme, and jurisdiction for intentional torts done by employers to their employees lies in the Court of Common Pleas. Therefore, we need not concern ourselves with the hypothetical subject-matter jurisdiction question.

Rather, we should concentrate on the question of whether appellants have failed to state a claim. Civ. R. 12(B)(6). The majority correctly applies the test in *O'Brien* v. *University Community Tenants Union* (1975), 42 Ohio St. 2d 242: "* * * it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." In this case, we examine appellants' complaint and determine whether they have alleged beyond doubt an intentional tort which will permit recovery by appellants outside the workers' compensation system.

Appellants allege that appellees *knew* of the conditions that existed but failed to correct them, to warn appellants or to report these conditions to governmental authorities. Nevertheless, these allegations may not constitute intent. "[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong." Prosser on Torts (1971), Section 8, page 32 (footnote omitted). Appellants have not clearly alleged any degree of certainty.

The majority, however, concludes that "[n]o reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee * * *." I prefer the analysis of Professor Prosser. Every undertaking involves some risk. We should not circumvent the statutory framework for workers' compensation merely because a known risk existed. We should demand a virtual certainty.

For this reason, the majority is correct in remanding this case to the trial court for a factual determination as to whether

appellees committed an intentional tort or whether recovery should occur exclusively under the workers' compensation system. The extent to which the members of this court disagree demonstrates that a finder of fact should resolve this case. We should make it clear to the trial court, however, that *this court makes no decision* as to whether appellants' allegations necessarily constitute an intentional tort.

Accordingly, I concur in the judgment only to the extent that the majority leaves the question of intent to the finder of fact in the trial court. I do not concur in the syllabus as a proper statement of the law of this case, however. The ultimate question, as to whether appellees' conduct was indeed an intentional tort, remains.

HOLMES, J., dissenting. In the syllabus the majority states broadly what might be considered as accurate law regarding the right of an employee to bring an action against his employer for the latter's commission of an intentional tort against the employee. However, the opinion then proceeds to emasculate this basic valid premise and radically depart from historic Ohio law by validating actions brought by employees against their employer for their condition, illness or disease occasioned by and arising out of their employment, and while working within the scope of their employment.

The use of the particular chemicals, found here to be utilized by the employing company, were so introduced into the manufacturing process by way of a business or commercial judgment to effect an end product of the manufacturing process and not utilized to intentionally injure these employees. These appellants, and other employees of Milacron, were employed to engage in the manufacturing process, using the necessary ingredients or products reasonably determined by the management of the employer. Injuries, occupational disease, or bodily condition received or contracted by any employee in the course of or arising out of his employment and use of the materials of manufacture must, insofar as bringing an action against an employer, be considered a hazard of employment which may be compensable under R. C. 4123.01 to 4123.94, but not

actionable in a civil suit against the employer. Section 35 of Article II, Ohio Constitution; R. C. 4123.74 and 4123.741.

There has been no intentional or malicious tort alleged here which could reasonably withstand a motion to dismiss the complaint pursuant to Civ. R. 12(B)(1) and (6). The trial court was correct in granting such motion, and the Court of Appeals did not err in affirming the trial court's judgment.

I would accordingly affirm the Court of Appeals.

KRUPANSKY, J., dissenting. The majority opinion, while appearing on the surface to be a humanitarian gesture, in effect undermines the beneficent purposes for which the Ohio Workers' Compensation Act was created. I must, therefore, respectfully dissent.

In my opinion, the Ohio Constitution and the Revised Code mean precisely what they say: workers' "compensation shall be *in lieu of all other rights to compensation,* or *damages,* for * * * injuries, or occupational disease, and any employer who pays the premium * * * *shall not be liable to respond in damages at common law* or by statute for such * * * injuries or occupational disease." Section 35, Article II, Ohio Constitution. (Emphasis added.) Appellants have convinced the majority that "all" does not mean "all," but instead means "all, except for rights to compensation for intentional torts."

Nowhere in the language of the Constitution or the statute is there support for the conclusion that the workers compensation system was designed to compensate employees solely for employer negligence. The majority reasons neither the Code nor the Constitution "expressly extend the grant of immunity to actions alleging intentional tortious conduct." However, neither is immunity expressly granted to actions alleging simple negligence. Does it follow, therefore, that a liberal construction of the Act calls also for an exception for simple negligence, and that we should allow double recovery for employer negligence since it was not expressly excluded under the Act? The majority claims, if intentional torts are covered under the Act then intentional torts are encouraged. If

this is true, then are not negligence and industrial accidents similarly encouraged, since they are covered under the Act?

Such reasoning leads ultimately to releasing the floodgates to a whole vista of lawsuits, each claiming exceptions to the all-inclusive language of the Act. The majority opinion represents a foot in the door policy to encourage workers to sue their employers for damages in addition to compensation provided under the Act.

The intent of the General Assembly, in enacting R. C. 4123.35 was to eliminate *all damage suits* outside the Act for injury or disease arising out of employment, including suits based on intentional tort. If the General Assembly desired to create an exception for intentional misconduct it surely could have done so. R. C. 4123.54, which disallows recovery for employees whose injuries were "purposely self-inflicted," illustrates the legislature's awareness of the possibility of excepting intentional wrongdoing.

As the majority notes, workers' compensation does not provide full compensation for employees suffering from occupational diseases or injuries. The Act, however, does not differentiate between injury or disease caused negligently and injury or disease caused intentionally. If, as the majority concludes, "there is no legitimate reason why an employer should be able to escape from" providing full compensation for intentional torts, then there is likewise no reason to allow the employer to "escape" from paying full damages for simple negligence.

The majority's myopic approach disrupts the delicate balance struck by the Act between the interests of labor, management and the public and signals the erosion of a valuable system which has served its purpose of providing a common fund for the benefit of all workers.

While R. C. 4123.95 provides for a liberal construction of the Act, it must not be used as a panacea to justify reasoning which suffers from logical malnutrition. One of the long-range effects of permitting recovery in these types of cases is the

additional costs that will ultimately have to be borne by the consumer through increased product prices. Goods manufactured in this state will thereby suffer a competitive disadvantage, and a less hospitable climate is created to attract and maintain industry in this state. Since industry provides jobs, the labor force has an interest in encouraging industry. Thus, while some workers may benefit from recovery against the employer for intentional torts in addition to collecting workers' compensation benefits, we would be ill-advised to engage in such irresponsibility for the benefit of a few at the detriment of so many.

To avoid such catastrophic results, I would therefore affirm the judgments of the lower courts.

HOLMES, J., concurs in the foregoing dissenting opinion.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

EDWARD BLANKENSHIP, *et al.*,
Plaintiffs,

—VS.—

CASE NO.
A-7901567

CINCINNATI MILACRON CHEMICALS, INC.,
c/o R. J. HANS, *et al.*,
Defendants.

APPEARANCES:

JERALD D. HARRIS, *Esq.*,
Counsel for Plaintiffs.

GERALD J. RAPIEN, *Esq.*,
Counsel for Defendants.

BE IT REMEMBERED that upon the hearing of this cause at the July, 1979, Term in the said Court of Common Pleas before the Honorable Robert H. Gorman, one of the Judges of said Court, the following proceedings were had.

AFTERNOON SESSION, September 26, 1979.

THE COURT: All right. Thank you very much, Gentlemen. I must comment that this question, although it did not arise as to intentional torts, was raised previously as regards to indemnification and specific contracts and the Court had an opportunity to go into section 35 of the article 2 in a reported opinion, which was Cincinnati Gas & Electric Company versus Westinghouse Electric Corporation, and merely on the question of exclusiveness and whether or not there could be implied indemnification or whether it had to be expressed. That isn't

the question here, actually, but I was impressed at the time with the fact that the Supreme Court seemed consistently to treat article 2 and section 35 and also section 4123.74 as exclusive remedies in every situation except where the parties had contracted away that immunity.

I find this case is governed by Bevis versus Armco Steel Corporation, 156 Ohio State 295. Granted that's only a 1951 case, but I do likewise concur that the legislative history indicates that this is a legislative function in any situation they have risen up to change those areas where they felt that the Courts were expanding recovery under occupational diseases cases and even though that they were compensable under the Workmen's Compensation Act.

This presents really a philosophical question, I think, more than anything else and that is when do courts legislate and when do they interpret. The rule of thumb and I think the wisdom in it is very evident is that in these areas courts will step in where individual constitutional rights have been infringed and technically where the legislative authority will not comply with the courts interpretation, accordingly the courts must then invoke the injunctive power, but in all cases which I have read, which I concur in, it has always been proof a clear violation of a right.

Now, the Supreme Court has very recently said that the right of Workmen's Compensation is not a fundamental constitutional right and that's been within the last month or so in an opinion I can't cite it off immediately. I can get it for you afterwards, if you want it.

Based upon the language of the statute and also upon article 2 section 35 I can only conclude that this is an area that I would be legislating in if I did not honor the pattern of the Supreme Court and of the language itself in those sections which establishes that this is an exclusive remedy and, therefore, would likewise apply to intentional torts. I realize fully, Mr. Harris, that that may not be the socially desirable result in

this case. I am quite aware of that. And by announcing this I am not stating that I am in agreement with the policy of the legislature as they have enacted legislation effecting worker's compensation law. To the contrary. But this is one of those cases where the conflicting rights must be weighed by the Court and that is the interpretation which you see in my opinion is purely legislative and outside the province of this Court; that the Constitution and the statute are clear as to the intent of the legislature as the legislative history, although not written, but reflected in Court decisions and by acts, subsequent acts.

For those reasons I find that the Court lacks jurisdiction of the subject matter and that the motion to dismiss is well taken. Will you present an entry, Mr. Rapien?

MR. RAPIEN: Yes, I will.

THE COURT: I assume, obviously, this case is going to go on so I would appreciate it if you would get the entry in within a week so that Mr. Harris may have the opportunity to take this up to the Court of Appeals for appellate review.

MR. RAPIEN: I will do that, Your Honor. Thank you.

THE COURT: Thank you very much, Gentlemen.

[Certificate of Shorthand Reporter Omitted]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

EDWARD BLANKENSHIP, *et al.*,
Plaintiffs,

v.

CINCINNATI MILACRON CHEMICALS, INC., *et al.*,
Defendants.

Case No. A7901567

ORDER GRANTING MOTION TO DISMISS OCTOBER 5, 1979

This cause came to be heard on the Motion of Defendants Cincinnati Milacron Chemicals, Inc., Ralph Binns, Joseph Mazzei, Kenneth Ziegel, Robert C. Whitman, Ed Wolff, William Jones and Alan Berenson (herein referred to as "Defendants") for an order dismissing them as party-defendants herein under Rule 12(B) of the Ohio Rules of Civil Procedure. The Court, having considered the pleadings, the briefs submitted by counsel and the oral arguments made by counsel in open court, finds that the Motion is well taken and is hereby granted, and the action is dismissed as to Defendants, with prejudice at Plaintiffs' costs.

This Court further being of the opinion that there is no just reason for delay, hereby enters final judgment in favor of Defendants on all claims.

JUDGE ROBERT GORMAN

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IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

Filed January 14, 1981

EDWARD BLANKENSHIP, *et al.*,
Plaintiffs-Appellants,

No. C-790768

vs.

OPINION.

CINCINNATI MILACRON CHEMICALS, INC., *et al.*,
Defendants-Appellees.

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Mr. Jerald D. Harris, 711 Atlas Bank Building, 524 Walnut Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellants,

Messrs. Taft, Stettinius & Hollister, Gerald J. Rapien of counsel, 600 Dixie Terminal Building, Cincinnati, Ohio 45202, for Defendants-Appellees.

PALMER, J.

The plaintiffs-appellants, eight employees and former employees of defendant Cincinnati Milacron Chemicals, Inc. (Milacron) and their wives, instituted this tort action for compensatory and punitive damages against Milacron, several fellow employees and a number of unidentified chemical manufacturers and distributors on February 22, 1979. On March 26, 1979, Milacron and the individual defendants moved to dismiss the complaint pursuant to Civ. R. 12 (B)(1) and (6). Memoranda were submitted by both parties. There-

after, plaintiffs amended the complaint to specifically identify the chemical manufacturers and distributors. Defendants again moved to dismiss the complaint on identical grounds: that the trial court lacked subject matter jurisdiction and that the plaintiffs had failed to state a cause of action upon which relief could be granted. On October 5, 1980, the trial court issued an order granting the motion and dismissing the action with prejudice as to Milacron and the fellow employees on the ground that the action was barred by relevant sections of the Ohio Constitution and the Ohio Workers' Compensation Act. (T.d. 24.) Plaintiffs' action against the chemical manufacturers and distributors is still pending. On appeal, plaintiffs contend in their single assignment of error that the trial court was incorrect in dismissing their complaint.

The employment relationship between plaintiffs and Milacron is not disputed, nor is it disputed that the individual defendant fellow servants were, at all times relevant, also employed by Milacron. Plaintiffs, stationed by Milacron at its Reading, Ohio, chemical manufacturing facility, contended that through their work they were exposed to allegedly harmful chemicals and as a result suffered sickness, pain and discomfort due to "chemical intoxication." (T.d. 1, 15.) Significantly, plaintiffs contended in the original and amended complaints that they "... were exposed to the fumes and otherwise noxious characteristics of MC, SnC1, TMA and tin *within the scope of their employment.*" *Id.* (Emphasis added.) Plaintiffs have never disputed the fact that exposure to such toxic substances was an experience unique to their working environment; the gravaman of plaintiffs complaint concerns the manner in which they were exposed.

Three of the six claims asserted by the plaintiffs are directed at Milacron and the fellow employees. In counts four and five, the plaintiffs allege that the defendants "... intentionally, maliciously, and in willful and wanton disregard" of the employees' health, breached a duty to warn of and correct health hazards existing at the Reading plant, failed to warn of "occupational diseases," and failed to provide periodic

medical examinations. In the sixth count, the wives of the employees seek recovery against Milacron and their husbands' fellow employees for loss of consortium. *Id.*

Plaintiffs have never disputed, either in the trial court or before this Court, that Milacron is a fully-covered, self-insured employer, in full compliance with all the requirements of the Ohio Workers' Compensation Act. R.C. 4123.01 *et seq.* Nor have plaintiffs alleged that "chemical intoxication" is not a compensable injury under the Act. In fact, plaintiffs are currently receiving Workers' Compensation benefits or actively pursuing claims for benefits before the Industrial Commission of Ohio. Plaintiffs' sole contention is that where employees allege facts which give rise to an action at common law for intentional torts, the employer may not clothe itself with the cloak of immunity provided for complying employers and fellow employees in R.C. 4123.74 and R.C. 4123.741. To permit this, argue the plaintiffs, is tantamount to granting employers a license to inflict injuries upon employees intentionally and with the knowledge that personal liability may not be imposed as a result thereof, a stituation neither contemplated nor intended by the Act and otherwise contrary to public interest. Accordingly, plaintiffs challenge the trial court's decision that R.C. 4123.74 and R.C. 4123.741 provide the defendants immunity from liability for the conduct alleged in the complaint as an improper and unjust interpretation of the law. For the reasons stated below, we disagree.

Article II, Section 35 of the Ohio Constitution serves as the fundament for legislative enactments in the area of workers' compensation by providing, in pertinent part:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made

> therefrom. ***Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance therewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.*** (Emphasis added.)

This section, enacted in 1923, confers upon the Legislature the power to devise a compensation scheme under these terms and to delegate the administration of that scheme to the Bureau of Workers' Compensation and the Industrial Commission.[1] *See Hall v. Industrial Comm'n* (1936), 131 Ohio St. 416, 3 N.E.2d 367. In construing this section, the Supreme Court of Ohio has stated:

> By this amendment, *the right of the workman* (or in the case of death his legal representative) *to maintain an action at law was extinguished* even though the injury was caused by a complying employer's violation of a lawful requirement; . . . *regardless of how the injury occurred,* the rights of the workman (or in the case of death his legal representative) were determined by the Industrial Commission under the compensation act. *Thereafter the courts were without jurisdiction to entertain an action for damages . . . by or on behalf of a workman against his complying employer.*

State, ex rel. Engle v. Industrial Comm'n (1944), 142 Ohio St. 425, 430-31, 52 N.E.2d 743, 746 (Emphasis added). As noted in *Engle,* the express purpose of this section was to abolish civil actions by workers against complying employers for work-related injuries.

The legislative implementation of Art. II, Section 35 is provided by R.C. 4123.74, which on its face guarantees that a complying employer ". . . shall not be liable to respond in

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[1] For a complete history of Art. II, Section 35 and the legislation passed pursuant thereto, *see Bevis v. Armco Steel Corp.* (1951), 156 Ohio St. 295, 102 N.E.2d 444, and *Bevis v. Armco Steel Corp.* (1949), 86 Ohio App. 525, 93 N.E.2d 33, *appeal dismissed* (1950), 153 Ohio St. 366, 91 N.E.2d 479, *cert. denied,* 340 U.S. 810.

damages at common law or by statute for such death, injuries or occupational disease," thus reiterating the constitutional mandate. Ohio courts have had frequent occasion to speak to what now must be held to be the clear meaning of the statute—that a court lacks jurisdiction to entertain an employee's civil action for damages against an employer in compliance with the compensation act. *See, e.g., Campbell v. Centra Terminal Warehouse* (1978), 56 Ohio St. 2d 173, 383 N.E.2d 135; *Danie v. MacGregor Co.* (1965), 2 Ohio St. 2d 89, 206 N.E.2d 554; *Greenwalt v. Goodyear Tire & Rubber Co.* (1955), 164 Ohio St. 1, 128 N.E.2d 116; *Sebek v. Cleveland Graphite Bronze Co.* (1947), 148 Ohio St. 693, 76 N.E.2d 892; *Allen v. Eastman Kodak Co.* (10th Dist. 1976), 50 Ohio App. 2d 216, 362 N.E.2d 665; *Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co.* (8th Dist. 1945), 77 Ohio App. 121, 62 N.E.2d 180, *appeal dismissed,* 145 Ohio St. 615.

The law of this appellate district is entirely consistent with this position, as demonstrated by this Court's decision and discussion of employer immunity under Ohio law in *Bevis v. Armco Steel Corp.* (1949), 86 Ohio App. 525, 93 N.E.2d 33, *appeal dismissed* (1950), 153 Ohio St. 366, 91 N.E.2d 479, *cert. denied,* 340 U.S. 810. In *Bevis,* similar to the instant case, a civil action against an employer by an employee was grounded upon a theory of intentional tort, alleging that the employer had intentionally concealed the existence of a disease and knowingly misrepresented the results of medical examinations of an employee who had contracted silicosis as a result of his work environment. This deceit purportedly induced the employee to continue working unaware of his condition and with the effect of worsening his infirmity. In affirming the trial court's dismissal of this action due to lack of jurisdiction over the subject matter and failure to state a claim for relief, this Court explained:

> [I]t is clear that the Constitution and laws intend, and the Supreme Court . . . has so construed them, that *the open liability of employers is abolished and in every case where the injury, disease or bodily condition occurred in or*

> ***arose out of the employment, no matter how incurred, the Workmen's Compensation Act is the exclusive remedy;*** that such condition is neither compensable under that law or not at all; and that no action of any kind may be brought against a complying employer thereof, whether or not such injury, disease, or bodily condition is compensable under the law.

Id. at 533, 93 N.E.2d at 37 (Citations omitted; emphasis added). *Accord, Roof v. Velsicol Chem. Corp.* (N.D. Ohio 1974), 380 F. Supp. 1373; *Madrin v. Wareham* (W.D. Pa. 1972), 344 F. Supp. 166; *Lacker v. Roxana Petroleum Corp.* (6th Dist. 1931), 40 Ohio App. 444, 179 N.E. 202; *Gillman v. Ross* (C.P. Hamilton County 1971), 30 Ohio Misc. 34, 277 N.E.2d 256.

Thus, it is abundantly clear that where an employee seeks to circumvent the exclusive nature of the workers' compensation scheme by complaining that his injuries were sustained as a result of intentional conduct by a complying employer, the court is without jurisdiction to entertain the action. *State, ex rel. Allied Chem. Corp.* v. *Earhart* (1974), 37 Ohio St. 2d 153, 310 N.E. 2d 230. *But see Hamilton* v. *East Ohio Gas Co.* (9th Dist. 1973), 47 Ohio App. 2d 55, 351 N.E.2d 775.

The only exceptions to this rule of exclusivity arise in situations where the employee sustains injuries due to the conduct of the employer, but within a relationship other than employment. In *Guy* v. *Arthur H. Thomas Co.* (1978), 55 Ohio St. 2d 183, 189-90, 378 N.E.2d 488, 492, an employer-hospital was held liable for its negligent treatment of an employee, who had assumed the status of a patient of the hospital at the time of the injuries complained of. In so holding, the court focused upon the *status* of the employee at the moment of injury, *Cudahy Packing Co.* v. *Parramore* (1923), 263 U.S. 418, 423, asserting that the exception was necessitated by a recognition that the duties of the tortfeasor arose from its non-employer relationship with the employee-patient, and, therefore, the employer could not avail itself of the immunity extended by

R.C. 4123.74. *Accord, Campbell, supra; Daniels, supra; Republic Steel Corp.* v. *Glaros* (7th Dist. 1967), 12 Ohio App. 2d 29, 231 N.E.2d 306. *See Mercer* v. *Uniroyal, Inc.* (6th Dist. 1976), 49 Ohio App. 2d 279, 361 N.E.2d 492 (hazard must be one of employment, not generally common to public, and there must exist a causal nexus between conditions of employment and injury). This exception, like any other, is neither lightly conferred nor expansively construed, and in no way provides support for plaintiffs' position in the instant case. An allegation that intentional or willful conduct on the part of an employer resulted in an employee contracting an occupational disease does not state a claim which raises the issue of the employer's "dual capacity," especially where, as here, there exists a patent causal nexus between the hazards of employment and the injuries complained of, and cases cited to us by plaintiffs in support of their position are inapposite.

The only supportive case cited to us by the plaintiffs, and indeed the only such case we have been able to discover, is *Delamotte* v. *Unicaste Div. of Midland Ross Corp.*, No. L-78-039 (6th Dist. Dec. 15, 1978), *cert. denied.* In *Delamotte,* the Ohio Court of Appeals for the Sixth District held that where the plaintiff alleged that his employer fraudulently, maliciously and willfully withheld a diagnosed condition of silicosis from the injured employee, thereby exacerbating his condition, causing him physical suffering and financial loss, the trial court could not dismiss the action for lack of subject matter jurisdiction or failure to state a claim for relief. The *Delamotte* court reasoned that intentional or malicious conduct by an employer injurious to an employee does not constitute a hazard of employment, and is, therefore, analogous to the concept of "dual capacity" as outlined in *Guy, supra.* In reaching this conclusion, however, the *Delamotte* court failed to focus on the issue of the *status* of the employee and his relationship with his employer at the time of injury, a consideration critical to the *Guy* decision. Insofar as the complaint in *Delamotte* was predicated upon fraud, it may be said to be inapposite to the instant case. However, and more pertinent to plaintiffs' argument, insofar as *Delamotte* may be interpreted to create an intentional tort exception to R.C.

4123.74 employer immunity, it represents a clear departure from established principles of Ohio law, and, with respect for our brothers on the Sixth District, we decline to follow it. *Greenwalt, supra* at 5-7, 128 N.E.2d at 120-21 (dismissing claim grounded upon the intentional tort of fraud), *Bevis, supra* at 533, 93 N.E.2d at 37 (dismissing claim grounded upon the intentional tort of deceit).

For these reasons, we hold that where an employee alleges that an occupational disease, causally connected to the hazards of his employment, was contracted due to the intentional and malicious conduct of the employer, the claim is legally insufficient and is properly dismissed for want of jurisdiction over the subject matter, Civ. R. 12(B)(1), and for failure to state a claim upon which relief could be granted, Civ. R. 12(B)(6). To hold otherwise would clearly frustrate the enabling language of Art. II. Section 35 of the Ohio Constitution and the legislative scheme embodied in R.C. 4123.74, and would involve this Court in promulgating substantive law, an exercise not within our constitutional powers. *See State, ex rel. City Iron Works* v. *Industrial Comm'n* (1977), 52 Ohio St. 2d 1, 368 N.E.2d 291; *Provident Bank* v. *Wood* (1973), 36 Ohio St. 2d 101, 304 N.E.2d 378. Accordingly, inasmuch as plaintiffs' assignment of error challenges the dismissal of the employees' complaint against defendant Milacron, it is without merit and overruled.

There remains the issue as to whether the trial court correctly dismissed the cause of action by the wives of the injured employees based upon loss of consortium.[2] The same

[2] On oral argument, plaintiffs conceded that claims asserted against fellow employees, contained in the fourth and fifth counts of the complaint, were clearly barred by the terms of R.C. 4123.741 which grants fellow servants immunity from liability for injuries sustained by another employee, where such injury is compensable under the statute. Since the plaintiffs were receiving compensation benefits at the time of filing the instant action, the operation and effect of R.C. 4123.741 barring any such action cannot be disputed. *See Lewis v. Chemetron Corp.* (N.D. Ohio 1978), 448 F. Supp. 211; *Lacher v. Roxanna Petroleum Corp.* (6th Dist. 1931), 40 Ohio App. 444, 197 N.E. 202; *Gillman v. Ross* (C.P. Hamilton County 1971), 30 Ohio Misc. 34, 277 N.E.2d 256.

legal principles that mandate the dismissal of claims by the employee-husbands require the trial court to dismiss, on equal grounds, the derivative claims for loss of consortium instituted by third parties. The comprehensive immunity granted to employers is sufficiently broad to require the dismissal of an indirect action by the spouse of an injured employee. *Bevis, supra; Cincinnati Gas & Elec. Co.* v. *Westinghouse Elec. Corp.*, No. C-780412 (1st Dist. Oct. 3, 1979); *Williams* v. *Ashland Chem. Co.* (10th Dist. 1976), 52 Ohio App. 2d 81, 368 N.E.2d 304; *Bankers Indem., supra. See Roof, supra.* Accordingly, inasmuch as the instant assignment of error challenges the dismissal of the third party complaint of the employees' wives, it too is without merit and overruled.

The judgment is affirmed.

BETTMAN,[3] P. J., AND BLACK, J., CONCUR.

BLACK, J., CONCURRING.

I concur in the decision in this case but on a limited basis that seems worthy of expression.

Despite allegations that the employer (defendant) acted intentionally, maliciously and in willful and wanton disregard of their health, the employees (plaintiffs) are currently receiving or actively claiming Workers' Compensation benefits. It therefore appears that the wrong complained of is compensable under the Workers' Compensation Law. Section 35, Article II of the Ohio Constitution clearly states that workers' compensation shall be in lieu of all of the rights to compensation or damages for injuries or occupational disease "occasioned in the course of employement." If the injury is compensable under R.C. Chapter 4123, it is not compensable otherwise. *State, ex rel. Allied Chemical Corp.* v. *Earhart* (1974), 37 Ohio St. 2d 153, 310 N.E.2d 230.

Language in the cases indicates that the sole and exclusive source of recovery is workers' compensation even when the

[3] Bettman, P.J., concurred in the foregoing Decision prior to his resignation from the court.

injury is caused by an "intentional tort." *Bevis* v. *Armco Steel Corp.* (1949), 86 Ohio App. 525, 93 N.E.2d 33, *appeal dismissed* (1950), 153 Ohio St. 366, 91 N.E.2d 479, *cert. denied*, 340 U.S. 810. I would interpret this language to mean that workers' compensation is the sole remedy when the cause of the disabling harm was intentional in the sense that the employer was aware of the risk of harm and consciously decided to take that risk.

However, there is another meaning to "intentional tort," one that appears to be outside the contemplation of workers' compensation and Section 35, Article II of the Ohio Constitution. I refer to harm deliberately inflicted with the purpose to hurt the injured worker. Such deliberate harm to a targeted individual appears to me to be beyond the scope and intention of the immunity granted by the Constitution to employers complying with the Workers' Compensation Law. The exception would have common elements with those cases that hold that an employee may recover directly from the employer when the injury was caused in a relationship other than employment. *E.g., Guy* v. *Arthur H. Thomas Co.* (1978), 55 Ohio St. 2d 183, 378 N.E.2d 488, where a hospital employee was allowed to recover from the employer, a hospital, because the employee received the injury as a patient in the hospital.

The instant case does not present a claim of harm deliberately inflicted by the employer with purpose to harm targeted employees but I would not want our language to foreclose the possibility of direct recovery from the employer in such event.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS

EDWARD BLANKENSHIP *et al.*,
Appellants,

vs.

CINCINNATI MILACRON CHEMICALS, INC., *et al.*,
Appellees.

1982 TERM

To wit: April 7, 1982

No. 81-402
REHEARING

It is ordered by the court that rehearing in this case is denied.

FILED
COURT OF APPEALS
APRIL 8, 1982
HAMILTON COUNTY, OHIO

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 7th day of April 1982.

THOMAS L. STARTZMAN, *Clerk.*

By SAM F. ADKINS, *Deputy.*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

EDWARD BLANKENSHIP et al.,
Appellants,

vs.

CINCINNATI MILACRON CHEMICALS, INC., et al.,
Appellees.

1982 Term

To wit: March 3, 1982

No. 81-402

MANDATE

To the Honorable Common Pleas Court.

Within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and cause remanded to the Common Pleas Court for further proceedings according to law, for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN
Clerk

..... 19....

.....

..... Deputy

RECORD OF COSTS

Docket Fee	$ 20.00	Paid by Kondritzer, Gold & Frank
Docket Fee	$	Paid by
Docket Fee	$	Paid By
Printing Record	$	Paid by
Supplemental Record	$	Paid by
Sheriff's Costs	$	Paid by
Sheriff's Costs	$	Paid by

CASE NO. 81-402

IN THE SUPREME COURT OF OHIO

Appeal from Court of Appeals
First Appellate District
Hamilton County, Ohio

EDWARD BLANKENSHIP, *et al.*,
Plaintiffs-Appellants

vs.

CINCINNATI MILACRON CHEMICALS, INC., *et al.*,
Defendants-Appellees

DEFENDANT-APPELLEES' MOTION FOR REHEARING AND SUPPORTING MEMORANDUM

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APPELLEE'S MOTION FOR REHEARING

Pursuant to Rule IX of the Rules of Practice, Defendants-Appellees hereby move the Court for a rehearing of this appeal and a reconsideration of the Court's decision for the following reasons:

I. DEFENDANT-APPELLEES HAVE BEEN DEPRIVED OF THEIR RIGHT TO A FAIR AND IMPARTIAL DETERMINATION OF THIS APPEAL DUE TO THE IMPROPER PARTICIPATION IN THE DECISION BY CHIEF JUSTICE CELEBREZZE WHO, AFTER ANNOUNCING HIS CANDIDACY FOR THE POLITICAL OFFICE OF GOVERNOR OF OHIO, FAILED TO RESIGN HIS JUDICIAL OFFICE AS REQUIRED BY CANON 7 OF THE CODE OF JUDICIAL CONDUCT.

II. DEFENDANT-APPELLEES HAVE BEEN DEPRIVED OF THEIR RIGHT TO A FAIR AND IMPARTIAL DETERMINATION OF THIS APPEAL DUE TO THE BIAS AND PREJUDICE AGAINST THEM DEMONSTRATED BY CHIEF JUSTICE CELEBREZZE AND JUSTICES SWEENEY AND CLIFFORD BROWN.

III. THE RESULT REACHED BY THE MAJORITY IN THIS CASE IS THE RESULT OF NUMEROUS ERRORS OF LAW.

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MEMORANDUM IN SUPPORT OF MOTION

It is with deep regret, but with a firm conviction of worthy purpose, that Appellees undertake this request for a rehearing and reconsideration of the Court's decision in this case. After reading, re-reading and studying the six opinions which make up the decision, we are profoundly troubled by the apparent willingness of the Court to commit this decision as it now stands, to the indelible annals of Ohio jurisprudence. With all due respect to the office of the Court, we regard the decision not only as a clearly erroneous determination of the legal rights of the parties, but, even more tragically, as an embarrassment to the high standards of judicial ethics and objectivity which Ohioans have a right to expect from their highest court. We sincerely hope that, given this opportunity to reconsider, the Court will act to rectify both the errors of law and the judicial impropriety which taints the decision.

I. DEFENDANTS-APPELLEES HAVE BEEN DEPRIVED OF THEIR RIGHT TO A FAIR AND IMPARTIAL DETERMINATION OF THIS APPEAL DUE TO THE IMPROPER PARTICIPATION IN THE DECISION BY CHIEF JUSTICE CELEBREZZE WHO, AFTER ANNOUNCING HIS CANDIDACY FOR THE POLITICAL OFFICE OF GOVERNOR OF OHIO, FAILED TO RESIGN HIS JUDICIAL OFFICE AS REQUIRED BY CANON 7 OF THE CODE OF JUDICIAL CONDUCT.

Even before there were any formalized canons of judicial ethics, society's need for a judiciary free from the influence of partisan politics was well-recognized. In *State ex rel Weinberger v. Miller* (1912), 87 Ohio St. 12, 99 N.E. 1078, upholding the constitutionality of legislation providing for the election of judicial officers by separate ballot, the Ohio Supreme Court emphasized the difference between candidates for legislative or executive offices on the one hand, and judicial office on the other:

> No partisan political platform can be written for the judge. He is charged with the interpretation and the

> administration of the law as he finds it. He has no voice in framing it. He must not depart from the plain provisions thereof, no matter how much he may be opposed to the principles or purposes of it. In the discharge of his duty a judge is not concerned with party platforms or party expediency. In his official capacity he can serve no party, promulgate no partisan theories of government, encourage no partisan economic measures. 87 Ohio St. at 48

The Court went on to observe that the failure of a candidate for judicial office to conform his conduct to this demand of his office properly subjects him to grave criticism for compromising the impartiality he must always retain:

> By common consent it has always been regarded highly improper for a judge or a candidate for judicial position, to serve upon party committees or make partisan speeches. He is required to keep his mind free from partisan bias and prejudice, so that he may be in a position to protect the rights of all litigants and determine the justice of every cause, regardless of political influence. 87 Ohio St. at 48

In 1954, the Ohio Supreme Court adopted the Canons of Judicial Ethics, including Canon 30 which gave effect to the inherent incompatibility between politics and judicial impartiality by demanding the resignation of any judge who decides to become a candidate for a nonjudicial office. In pertinent part Canon 30 stated:

> "While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party."
>
> "If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend

> to arouse reasonable suspicion that he is using the power of his judicial position to promote his candidacy or success of his party."

The binding effect of this Canon upon the judges of Ohio was made apparent in *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17. In that case, the Supreme Court held that a judge who violated Canon 30 was subject to disciplinary action. The seventh paragraph of the Court's syllabus states the rule in no uncertain terms:

> 7. A member of the legal profession who is a judge is subject to disciplinary action when he becomes a candidate for a non-judicial office and does not resign his judicial position, thereby committing a breach of that part of Canon 30 of Judicial Ethics, as adopted by this court, which provides that "if a judge should decide to become a candidate for any office not judicial he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party".

In its opinion, the Court went on to emphasize that stringent enforcement of Canon 30 is required to avoid not only actual impropriety but even the appearance or suspicion of it:

> The purpose of such restrictions is to keep judges ever mindful that, even though they may have been nominated in a partisan primary and may have been connected to some extent with partisan politics during their campaign for election (though elected on a nonpartisan ballot), once elected to the judiciary they have assumed an office of public trust which must remain outside and distinct from the "mainstream" of partisan politics in order to maintain the independence, impartiality and freedom from bias, prejudice and pressure, which the people have a right to expect from their judges.
>
> It is thus apparent that the requirements of Canon 30 that a judge who becomes a candidate for a nonjudicial office shall resign his judicial position and that a judge who is a candidate for a judicial office must exercise caution in

> engaging in partisan activities are not merely arbitrary rules of conduct laid down by this court, but are requirements bottomed on the premise that the judiciary of the state of Ohio shall be kept as far as possible from the "mainstream" of partisan politics, all things considered, and that the resignation of the judge who becomes a candidate for a nonjudicial office is a reasonable measure designed to preclude the possibility of the intrusion of partisan politics into the administration of justice and to preclude even the suspicion of such intrusion, which would normally attach to every ruling a judge who retains the bench while a candidate for a nonjudicial office might make, *regardless of his intent or the soundness or justice of such ruling.* (Emphasis by Court) 168 Ohio St. at 26-27

In 1973 the Canons of Judicial Ethics gave way to the Code of Judicial Conduct which was officially adopted by the Ohio Supreme Court in 36 Ohio St.2d xix. The prohibitions of Canon 30 were carried over into Canon 7 of the new Code which states that "A judge should refrain from political activity inappropriate to his judicial office." Subsection A(3) of this Canon provides in pertinent part as follows:

> A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office. . . .

The applicability of this canon to justices of the Supreme Court is apparent from the lack of any restrictive language in the Code itself. Furthermore, Rule IV of the Supreme Court Rules for the Government of the Bar of Ohio provides that the Code of Judicial Conduct "shall be binding upon *all* judicial officers of this state." (Emphasis added).

It is also clear that the canon imposes a mandatory duty of resignation upon a judge who has become a candidate for another political office. In its Preface to the Code of Judicial Conduct, the Supreme Court stated that "The canons and the text establish mandatory standards unless otherwise indicated". 36 Ohio St.2d at XIX. In *Cuyahoga Co. Bd. of Mental Retardation v. Association* (1975), 47 Ohio App.2d 28, 351

N.E.2d 777, the court left no room for doubt as to the meaning of the word "should" as used in the Code of Judicial Conduct:

> In examining the Code of Judicial Conduct it is apparent that while the permissible guidelines are indicated by the use of the word "may", the mandatory portions are set forth by the use of the word "should". This is entirely consistent with the plain meaning of a word which expresses an obligation or duty. *See,* Black's Law Dictionary (4th ed. 1968); Webster's New World Dictionary (1963). 47 Ohio App.2d at 33

In spite of the mandatory duty upon a judge of this state under the Code of Judicial Conduc. to resign his office when he becomes a candidate for a non-judicial office, Chief Justice Celebrezze continued to serve as a Chief Justice, including his participation in the instance case, after formally announcing on January 15, 1982, that he would be a candidate for governor in the Democratic Primary. The press release issued by Chief Justice Celebrezze on that date (Exhibit A hereto) states that "I *will* be a candidate for governor", and "I *will then become* an active candidate for Governor." (Emphasis added.) Regardless of this apparent attempt to make his candidacy a future event, however, the entire text of the press release makes it abundantly clear that his decision to run had been made and therein communicated to the people of Ohio in no uncertain terms. Among other things, he stated that "this *decision* is right"; that "some may question my *decision to resign* the highest judicial post"; that "it has been my *great ambition to be Governor of Ohio*"; that "I *shall present my program* issue by issue"; that "I will inform the public, directly, what to expect from a *Celebrezze administration*", that *"My campaign,* will never . . . match my opponent's financial warchests; that *"I want to be Governor"*; and that *"my candidacy is best for Ohio"*. (Emphasis added.)

A judge who announces to the public his decision to run for governor and elaborates upon his campaign plans and goals in office in this manner thereby "becomes a candidate" within the meaning of Canon 7A(3) of the Code of Judicial Conduct. An interpretation which attempts to draw an ultra-fine dis-

tinction between a judge who has become a candidate and one who has only decided to become a candidate ignores the clear and salutary purpose of the canon to prevent even the suspicion that the judge is using the power and prestige of his office to promote and inspire his candidacy.

Therefore, by participating in the decision in this case which was released on March 3, 1982, Chief Justice Celebrezze seems to Appellees to have disregarded the prohibition of Canon 7A(3) of the Code of Judicial Conduct.

In reaching this conclusion, it must be clearly understood that Appellees are not expressing any opinion as to any "guilt" on the part of Chief Justice Celebrezze or whether disciplinary action is or is not appropriate. Rather, Appellees are focusing upon the actions of the Chief Justice solely from the standpoint of their effect upon the integrity of the Court's decision in this case.

The effect of Chief Justice Celebrezze's failure to resign on January 15, 1982, is to render his participation in this case void. In *Cuyahoga Co. Bd. of Mental Retardation v. Association, supra,* p. 5, the court held that where a judge has a clear and mandatory duty to disqualify himself from hearing a case, his attempt to act in violation of that duty is null and void. That case dealt with a trial judge who proceeded with a case in violation of Canon 3C of the Code of Judicial Conduct requiring a judge to disqualify himself when his impartiality is affected by his relationship to one of the parties. However, what the Court said there regarding the effect of his actions is particularly pertinent here:

> We are not persuaded that these "mandatory" and "binding" standards were intended to be empty admonitions which a trial judge could openly disregard, subject only to retrospective disciplinary action against himself, with no effect upon the improper actions which the canons were designed to protect against. Rather, we find that the design and purpose of the Code was to impose a standard of conduct upon judges to which they must conform. The

> duty of a trial judge under Section 3(C)(1)(d)(i) of the Code of Judicial Conduct, similar to that provided under 28 U.S.C. Section 445 (1975 Supp.) controlling the disqualification of federal judges, is one placed solely upon the individual judge. And like the attempt of a judge to exercise judicial power when prohibited by state or federal statutes, we find that such an attempt as exemplified herein was void. *See In re Dellenbaugh & Burke, supra; United States v. Amerine, supra.*
>
> * * *
>
> For these reasons, we hold that the trial judge in the instant case had a mandatory duty from the beginning of the proceedings to disqualify himself from this case, and that his each and every subsequent act, being in violation of his clear and mandatory duty, was utterly void and without effect. 47 Ohio App.2d at 33-34

See also, Beer v. Griffith (1978), 54 Ohio St. 2d 440, 337 N.E.2d 775, in which the Supreme Court recognized this principle by stating that a judge is "without power to hear and determine a cause after disqualification. . . ." 54 Ohio St. 2d at 442.[1]

Accordingly, the participation by Chief Justice Celebrezze in this decision, after it was incumbent upon him to resign, renders his vote with the majority void. That alone is sufficient, Appellees submit, to give an appearance of impropriety sufficient to blemish the Court's decision. But the situation prompts us to pursue our inquiry a step further. In *Mahoning County Bar Assn. v. Franko, supra,* p. 3, the Court did not end its inquiry with the determination that the failure of the judge to resign violated the language of the Canon:

> The respondent herein did not resign his judicial position while a candidate for prosecuting attorney.

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[1] In *Beer v. Griffith* the Court held that where there was a specific constitutional procedure for determining disqualification of a judge, the judge's actions prior to a determination under that procedure were not void, but voidable. However, there is no constitutional or statutory procedure for considering and deciding when a supreme court justice is disqualified.

> Although this fact standing alone might not warrant the discipline of suspension, we must look further and determine whether he not only committed a breach of Canon 30 by his failure to resign, but whether his offense was more serious in that he did in fact *use* the power and prestige of his judicial position to further his candidacy for a nonjudicial office. (Emphasis by Court). 168 Ohio St. at 27

Similarly, we proceed to examine the manner of Chief Justice Celebrezze's participation in the decision to see whether there is an indication that he may have attempted to use the power and prestige of his judicial position to further his candidacy for the governorship. At the outset, it must be apparent that the office of chief justice is the most powerful and most prestigious judicial position in the State. The obligation upon the occupant of that office to avoid the misuse, or the suspicion of misuse, of that power and prestige is correspondingly great, not only because of the wide circulation which his statements receive throughout the state, but also because of the influence he possesses among his fellow Supreme Court justices.

In this case, in spite of the uniquely high profile of his office, Chief Justice Celebrezze not only participated in this decision after announcing his decision to run for governor, but he also elected to assume an active and controversial role by writing a concurring opinion which clearly exceeds all reasonable bounds of judicial propriety.

As Justice William Brown observed at the outset of his opinion, the sole issue before the Court was whether or not the specific allegations in the Plaintiff's Complaint were sufficient to state a claim for relief in the face of the Constitutional and statutory provisions relating to employer immunity. In the two dissenting opinions, it is apparent that Justices Holmes and Krupansky properly focused their attention upon the language of the Complaint and the wording of the statute, and reached a legally defensible conclusion[2] which simply differs from the

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[2] In addition to Justices Holmes and Krupansky, Judge Gorman of the Common Pleas Court and Judges Palmer, Bettman, and Black of the Court of Appeals, have agreed with Appellee's position. These six jurists constitute a majority of the judges which have heard this case.

conclusion of the majority. Chief Justice Celebrezze began his concurring opinion by "enthusiastically" agreeing in full with the opinion of Justice William Brown. Presumably this includes the statement of the issue referred to above. But then the Chief Justice immediately launched a scathing personal attack upon the dissenting Justices which cannot be characterized as anything other than a shameful display of judicial intemperance. In language that leaves no doubt as to whom he is referring, he refers to them as "an enemy of all workers", likens them to a "19th century 'robber baron' ", and suggests that they either don't know how to read, don't understand what they read, or haven't bothered to read the applicable cases. He suggests that they are "Fantasy Island" residents if they don't know that toxic fumes and chemicals are hazards to many workers, and he concludes by stating that their views represent an "abdication of employer responsibility" and are "an affront to the dignity of every single working man and working woman in Ohio."

These statements by a chief justice in a judicial opinion are unprecedented enough by themselves. What is additionally disturbing, however, is that they appear to be prompted by a gross misreading of the dissenting opinions. Chief Justice Celebrezze says that he is

> "troubled by the language in the dissenting opinions that workers who are intentionally chemically poisoned on-the-job should not be able to recover damages from their employers *because the elimination of health risks would cost too much money, thus decreasing the profits of corporations.* I submit that anyone who believes that injuries or death from gases, fumes, impure air or dust should not be eliminated *because a manufacturer will suffer a competitive disadvantage* is an enemy of all workers". (Emphasis added.)

We have read and re-read the copy of the two dissenting opinions which we received from the Court, and we fail to find in them any language which even remotely resembles the emphasized language above. Nowhere in either of the dissenting opinions is there any language which would justify the

conclusion that Justices Holmes and Krupansky have stated, or personally believe, the statements which were attributed to them by Chief Justice Celebrezze and then used by him as a basis for referring to them as enemies of workers and robber-barons.

Whether Chief Justice Celebrezze was *in fact* motivated by political considerations in personally attacking the dissenting justices and misconstruing their position in this manner is something that Appellees obviously cannot know and do not allege. However, as previously stated, the purpose of Canon 7A(3) requiring a candidate for a non-judicial public office to resign his judgeship is to prevent not only the actual intrusion of partisan politics into the administration of justice, but also "even the suspicion of such intrusion." *Mahoning County Bar Assn. v. Franko, supra,* p. 3, 1968 Ohio St. at 27.

By accusing those who dissagree with his position in this case of being enemies of all workers and robber-barons, the Chief Justice inferentially proclaims himself as the worker's friend and ally who, if elected, will be dedicated to the service of the "working man and working woman", rather than the profit-hungry corporations who allegedly " 'cost-out' an investment decision to kill workers." It is hard to imagine a more politically oriented message to Ohioans from a man who had publicly stated seven weeks earlier that he wants to be governor and has decided to seek that office as a Democratic candidate. At the same time it is hard to imagine a more politically damaging accusation against the dissenting justices, both of whom are Republicans, and one of whom was likely to be named as Chief Justice Celebrezze's successor in that office. Appellees believe that no reasonable person who reads this decision with the knowledge that Chief Justice Celebrezze had announced his intention to run for governor can claim *no suspicion* that his remarks were motivated by partisan political considerations. Therefore, even if his failure to resign his judicial position can be dismissed as a mere technical violation of Canon 7A(3), the nature of his actual participation in this decision cannot be reconciled with either the letter or the spirit of the Canon.

There is yet another extremely disturbing aspect of this issue which must be raised. The words and actions of Chief Justice Celebrezze in this case have received the support and approval of Justices Sweeney and Clifford Brown who were also among the majority of the decision. The copy of the decision we received indicates that both of these Justices expressly concurred in Chief Justice Celebrezze's opinion, and further, that in his own concurring opinion, Justice Clifford Brown unequivocally praised what he described as "the perspicacity displayed by Chief Justice Celebrezze in his concurring opinion."

Since neither Justice Sweeney or Justice Clifford Brown are candidates for a non-judicial office, obviously neither can be said to have participated in this decision contrary to Canon 7A(3). However, it cannot be denied that they were fully aware of Chief Justice Celebrezze's announced intention to run for Governor *and* his intention to participate and write a concurring opinion in this case. Furthermore, they may also be fairly presumed to know the Code of Judicial Conduct, including the requirements of Canon 7A(3) requiring a declared candidate for a non-judicial office to resign his judgeship. Despite these circumstances, they nonetheless chose to ratify the Chief Justices' participation by concurring in his opinion. At the very least, they have thereby so identified themselves with his action as to preclude them from any further participation in this case.

Even if this conclusion is not justified by their mere act of concurring with Chief Justice Celebrezze, it most certainly is justified by the nature of what they concurred in. Enough has already been said about the unjustified and intemperate remarks of the Chief Justice and their undeniable political implications. By concurring in these remarks, Justices Sweeney and Clifford Brown have not only agreed that such remarks may be appropriately made in a judicial opinion, but also have demonstrated that they subscribe to and approve of the remarks themselves. Canon 7 of the Code of Judicial Conduct says generally that "a Judge Should Refrain from Political Activity Inappropriate to this Judicial Office." Canon 7A(1)(b)

states that "A judge . . . should not . . . publicly endorse a candidate for public office." The concurrences of Justices Sweeney and Clifford Brown arguably constitute a public endorsement of their fellow Democrat who had declared his intent to be a candidate for public office. They undeniably constitute a public endorsement of the statements of Chief Justice Celebrezze in his opinion.

The decision of Justices Sweeney and Clifford Brown to concur in the views expressed by Chief Justice Celebrezze was either a voluntary one reflecting genuine agreement with his remarks, or one which the power and prestige of his high office influenced them to make. Either way, whatever impropriety emanates from the participation and the opinion of Chief Justice Celebrezze touches and equally taints their participation in this decision as well.

The parties to a lawsuit are entitled to judges at every stage of the proceedings whose impartiality neither is, nor appears to be, subject to compromise on the basis of partisan political considerations. By not resigning his office as Chief Justice of Ohio's highest court after announcing his unequivocal intention to seek the Democratic nomination for governor, and by writing an opinion which is brutally intemperate but politically expedient, Chief Justice Celebrezze, and those Justices who concurred in his endeavors, have not met, in this case, the standard of judicial impartiality to which Appellees are entitled.

II. DEFENDANT-APPELLEES HAVE BEEN DEPRIVED OF THEIR RIGHT TO A FAIR AND IMPARTIAL DETERMINATION OF THIS APPEAL DUE TO THE BIAS AND PREJUDICE AGAINST THEM DEMONSTRATED BY CHIEF JUSTICE CELEBREZZE AND JUSTICES SWEENEY AND CLIFFORD BROWN.

In addition to specific prohibitions such as the one against inappropriate political activity by judges, the Code of Judicial Conduct also requires a judge to perform the duties of his office with dignity and impartiality. Canon 3A provides that in the

performance of his judicial duties, the following standards apply:

> (2) A judge should maintain order and decorum in proceedings before him.
>
> (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity. . . .
>
> (4) A judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending . . . proceeding. 36 Ohio St.2d at xxii

Any failure by a judge to conform his conduct to these standards properly subjects him to criticism. A serious failure can compromise his impartiality to such a degree that he actually becomes "biased" or "prejudicial", and, therefore, unfit to carry out his official duties with respect to a particular matter. In *State ex rel Pratt v. Weygandt* (1956), 164 Ohio St. 463, 132 N.E.2d 191, the Ohio Supreme Court defined the terms "biased" and "prejudiced", as they pertain to a judge, in the fourth paragraph of its syllabus:

> 4. The term, "biased or prejudiced," when used in reference to a judge before whom a cause is pending implies a *hostile feeling or spirit or ill will* or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, *as contra-distinguished from an open state of mind which will be governed by the law and the facts.* (Emphasis added.)

Apart from the partisan political implications discussed in the preceding section of this Memorandum, the separate concurring opinions of Chief Justice Celebrezze (in which Justices Sweeney and Clifford Brown concurred) and Justice Clifford Brown raise serious doubt as to the impartiality of these judges in this case. There are numerous statements in these opinions which demonstrate a degree of open hostility and indignation which, fortunately, are rarely seen in a judicial opinion. Ap-

pellees believe that this hostility has precluded Chief Justice Celebrezze and Justices Sweeney and Clifford Brown from approaching this case with the required "open state of mind which will be governed by the law and the facts." *State ex rel Pratt v. Weygandt, supra.*

The hostility to which we refer is evidenced in substantial part by the attitude of these Justices to their two dissenting fellow justices. Any judge who writes a separate concurring opinion for the sole purpose of making a humiliating personal attack, complete with outright name-calling, upon his brethren —whatever his supposed justification—has clearly forsaken his obligation under the Code of Judicial Conduct to maintain the decorum appropriate to the proceedings (Canon 3A(2)) and the basic courtesy he owes to "others with whom he deals in his official capacity" (Canon 3A(3)). But even more than that, when *THREE* Judges concur in such conduct to the extent evident from the decision in this case, it becomes more than an embarrassment to the legal profession. It leaves the litigants with the feeling that their cause has become a mere side-show to the carnage occurring in the center ring. Appellees cannot believe that judges so utterly preoccupied with giving vent to their personal animosities possess the ability to deal fairly and objectively with the legal issues presented by the case.

The rampant hostility expressed in the Chief Justice's concurring opinion is not spent entirely upon his fellow jurists. He directs a measure of it either at Appellees or at the employers of Ohio. He starts out by assumming that there are workers who are "intentionally chemically poisoned on-the-job". Then he condemns "the particularly egregious behavior on the part of *employers*—fraudulently misrepresenting or concealing workplace hazards". His hostility peaks as he charges that the "bottom line *of this case* is that prohibiting an employee from suing . . . would allow a corporation to *'cost-out' an investment decision to kill* workers". (Emphasis added.) Not even the Plaintiffs themselves have made allegations in their Complaint that Appellees have "intentionally chemically poisoned" them, "fraudulently misrepresented or concealed hazards", or made an "investment decision to kill them". Nor

is there any evidence in the record, or anywhere that we know of, to support the generalization that Ohio's employers engage in such conduct. Whether the Chief Justice's unfounded accusations are directed at Appellees in particular or the employers of Ohio is not readily apparent. But that is not important; in either event, his readiness to assume such an openly contemptuous attitude under the circumstances reveals a "fixed anticipatory judgment . . . as opposed to an open state of mind which will be governed by the law and the facts." (*State ex rel Pratt v. Weygandt, supra,* p. 16, syllabus 4).

Appellees are equally disturbed by certain remarks in the concurring opinion of Justice Clifford Brown which reveal the same kind of unfounded hostility toward Appellees or Ohio employers in general. We quote the following particularly offensive language from his opinion:

> "I note that the decision we reach today is attacked on the basis that "goods manufactured in this state will thereby suffer a competitive disadvantage, and a less hospitable climate is created to attract and maintain industry in this state". This is a *scare tactic* to create an illusion that industry will leave Ohio and establish itself in other states because Ohio does not grant immunity to employers who *intentionally harm* their employees. This *tactic and illusion* assumes without foundation that other states grant such immunity to *employers who intentionally maim and kill their employees. . . . Employers bent upon chemically poisoning their employees* have no place to go in the United States *to perform their perfidy with impunity.*
>
> *"The view expressed to support employer immunity is generated by greed to save a few dollars at the expense of chemically poisoned employees."* (Emphasis added.)

All of what Appellees said above regarding the impropriety of the similar remarks of Chief Justice Celebrezze apply with equal force to these hostile, intemperate, and unfounded accusations by Justice Clifford Brown.

Like the Chief Justice, he not only purports to know and attack the motives of employers in their dealings with their

employees, but he professes to know and attack the motives of those who even express views in support of employer immunity. Appellees (and their counsel) categorically deny, and utterly resent, the gross intemperance of a suggestion in a judicial opinion that their legal arguments are "generated by greed to save a few dollars at the expense of chemically poisoned employees". And although we have not been authorized to speak on behalf of the six judges who have agreed with Appellees' position in this case, we feel comfortable denying that they too are motivated by greed or by an allegiance to those so motivated. Any judge who (1) concerns himself with the motivation of a party (or a non-party), (2) professes to discern that motivation, and then (3) openly and intemperately attacks that motivation has unquestionably developed a "hostile feeling or spirit of ill will", and lacks an "open state of mind which will be governed by the law and the facts." (*State ex rel Pratt v. Weygandt, supra,* p. 16, Syllabus 4).

In yet another respect, the improper remarks of Justice Clifford Brown resemble those of Chief Justice Celebrezze. In the preceding section of this Memorandum, it was pointed out that the Chief Justice's personal attack upon the dissenting Justices was prefaced by alluding to statements attributed to them which, in fact, cannot be found in their dissenting opinions. It appears to Appellees that Justice Clifford Brown has done something similar. As indicated in the offensive portion of his opinion set out above at page 19, he prefaces his diatribe with a direct quotation which he promptly calls a "scare tactic" and an "illusion". Although his opinion is otherwise liberally footnoted, he fails to identify the source he is quoting. Appellees can positively state that nowhere in their Brief and at no time during oral argument did they make this statement. In fact, Appellees have never argued or suggested that attracting or maintaining industry in Ohio is a relevant factor to be considered by the Court in interpreting the scope of employer immunity. Furthermore, Appellees are not aware that any non-party has participated in these proceedings as an *Amicus Curiae,* except the Ohio AFL-CIO which was granted leave to intervene as an *Amicus Curiae* for the Appellants. Therefore, it would appear that the unidentified party who is

said to have "attacked" the court's decision in the manner quoted by Justice Clifford Brown is either imaginary or a stranger to the proceedings. If the attacker is imaginary, it should be obvious that the Justice's fabrication of a "straw-man" adds another dimension of impropriety to his unbridled hostility. On the other hand, if Justice Brown is accurately quoting a position taken by a stranger to the proceedings, it would appear that Canon 3A(4) of the Code of Judicial Conduct is pertinent:

> (4) "A judge should . . . neither initiate *nor consider ex parte or other communications concerning a pending . . . proceeding.*" (Emphasis added.) 36 Ohio St.2d at xxii

Just as the parties to a lawsuit are entitled to judges whose impartiality is not subject to compromise on the basis of partisan political considerations, so too, they are entitled to judges who have not become biased or prejudiced by hostile feelings or a spirit of ill will. The hostility and intemperance which permeates the concurring opinion of Chief Justice Celebrezze (concurred in by Justices Sweeney and Clifford Brown) and the separate concurring opinion of Justice Clifford Brown clearly warrant the conclusion that, with respect to this case, they are biased and prejudiced against Appellees, as that term is defined in Syllabus paragraph 4 of *State ex rel. Pratt v. Weygandt, supra,* p. 16.

III. THE RESULT REACHED BY THE MAJORITY IN THIS CASE IS THE RESULT OF NUMEROUS ERRORS OF LAW.

Appellees remain convinced of the correctness of their position, as upheld in the courts below, and believe that this Court's acceptance of Appellant's arguments has led to an incorrect result. The temptation to reargue is strong, but Appellees recognize the admonition of Rule IX of the Rules of Practice prohibiting a reargument of the case. However, the manner in which the Court dealt with the arguments in reaching its result is a matter which we feel must be addressed at least briefly.

Apart from the decision itself, we are troubled by the failure of the majority to address in their opinions the argu-

ments and the authorities cited by Appellees. Whether the immunity provided by R. C. 4123.74 extends to employer conduct referred to as "intentional" is treated by the Court as an issue of first impression. The opinions make no reference either to the prior versions of this statute or to the Ohio authorities which interpreted them, although these are critical factors in the search for legislative intent. Instead these authorities are ignored and their fate left uncertain, despite the fact that they are pertinent to this issue. We refer in particular to *State ex rel Engle v. Industrial Commission* (1944), 142 Ohio St. 425, 52 N.E.2d 743 and especially *Bevis v. Armco Steel Corp.* (1951), 156 Ohio St. 295, 102 N.E.2d 444, where Chief Justice Taft stated:

> These changes in the constitutional and statutory provisions relating to workmen's compensation make it apparent that, insofar as provisions relating to workmen's compensation bar suits against an employer, *the fact, that an action is based upon the defendant's intentional, wrongful and malicious act, does not result in a plaintiff having any greater rights to recover than if such action had been based merely upon negligence of the defendant.* (Emphasis added.) 156 Ohio St. at 301.

The immunity provision that he was interpreting was virtually identical to the present version of R.C. 4123.74. And yet this holding is given such "short shrift" by the Court that it is not even mentioned in the decision.

IV. CONCLUSION.

In *State ex rel Pratt v. Weygandt, supra,* p. 16, the Court concluded its opinion by quoting with approval the following language from the opinion in *Haslam v. Morrison, Judge* (1948) 113 Utah 14, 190 P.2d 520:

> "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts. This is not to say that the mere filing of an affidavit of bias and prejudice, *ipso facto* casts such suspicion on the judge, and

upon his integrity and fairness, that he ought to disqualify himself even though he may be entirely free of bias and prejudice if either litigant files an affidavit of bias and prejudice.

"Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness of integrity of the judge.' " 164 Ohio St. at 471

Although this is not proceeding based upon the filing of a formal affidavit of bias and prejudice, the Court's comments apply here with equal, if not greater, force. For the reasons detailed above, Appellees believe that the unique circumstances of this case require this Court to cure the overwhelming appearance of impropriety by granting Appellee's Motion for Rehearing.

Appellees believe it is obvious from the facts that Chief Justice Celebrezze and Justices Sweeney and Clifford Brown should not participate in the determination as to whether this Motion for Rehearing should be entertained or in any rehearing or reconsideration of the decision itself. Furthermore, under the circumstances, it would also be inappropriate for Chief Justice Celebrezze to designate the judges who will participate in any further proceedings in this case.

Finally, Appellees believe that a failure by the Court to grant the relief herein requested, in any respect, would deprive Appellees of their right to due process guaranteed by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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[Certificate of Service is omitted.]

[Appendix A to the Motion for Rehearing and Supporting Memorandum is a copy of the January 15, 1982 press release of Chief Justice Celebrezze, and is reproduced below at App. 161.]

SUPREME COURT OF OHIO

JANUARY TERM, 1982.

KNITZ, APPELLANT, *v.*
MINSTER MACHINE COMPANY, APPELLEE.

[Cite as Knitz v. Minster Machine Co. (1982), 69 Ohio St. 2d 460.]

Products liability—Design defect—Standard applied.

A product design is in a defective condition if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if the benefits of the challenged design do not outweigh the risk inherent in such design. (*Leichtamer* v. *American Motors Corp.*, 67 Ohio St. 2d 456, approved and followed.)

(No. 81-256—Decided February 26, 1982.)

APPEAL from the Court of Appeals for Lucas County.

Virginia Mae Knitz, appellant, began work at the Toledo Die and Manufacturing Company on August 16, 1976. For approximately the first week of her employment she operated punch presses. On August 23, 1976, she was assigned to operate a 60-ton Open Back Inclinable Press designed and manufactured by the Minster Machine Company, appellee.

That press functions to supply power in bringing two halves of a die together. The top half of the press is attached to a ram, which when the press is activated, descends five inches with sixty tons of force onto a bolster plate. The two die halves are, therefore, brought into contact and thereby shape the metal stock between them. The ram then ascends to its original position until again activated. The amount of time required for the ram to descend from its top position to its lower position is three quarters of one second.

On August 23, 1976, appellant was operating the press on a production run that required her to pick up and place a blank piece of metal stock in the space between the two halves of the

die with her hand. The press ram was then activated to descend by pushing down on the pedal of a foot switch attached to the press at floor level. After two hours of operation of the press, appellant stopped and left it in search of a more comfortable stool. When she returned, she found that a scrap bin beneath the press had been emptied and the foot switch had been moved. Appellant leaned on the bolster plate with her right hand and attempted to move the pedal back into place with her foot. While so doing, appellant activated the foot pedal, and the ram descended amputating two fingers of her right hand.

The press was delivered to the Toledo Die and Manufacturing Company on October 15, 1971. It was manufactured and shipped with a two-hand, button-tripping device, which is comprised of two buttons that are placed at shoulder level above the die ram area. Both buttons must be depressed in order for the press to be activated, so that the device prevents an operator from placing either hand in the die area while the ram is descending. Appellant's employer had also ordered an optional foot pedal tripping device, also designed by appellee, which was shipped with the press at that time. On the date of the accident, the foot pedal was attached to the press and was the sole method of activating the ram. The two-hand, button-tripping device, however, was disconnected and rendered inoperable.

Subsequent to shipment of the press but prior to the August 23, 1976, accident, appellant's employer had installed on this press a pull-back guard (a Posson type). A Posson pullback guard is attached to the wrists of the operator and physically pulls his hands and arms out of the die area when the ram descends. At the time of the accident, appellant did not have the pull-back guard attached to her wrists.

Appellant filed a complaint on August 2, 1978, against appellee in the Court of Common Pleas of Lucas County alleging, *inter alia,* that "the press was sold in a defective

condition which was dangerous to the user of said product."[1] Both parties filed motions for summary judgment. Appellee's motion was granted and appellant's motion was denied. Upon appeal to the Court of Appeals, the judgment of the trial court in favor of appellee was affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Green, Lackey, Nusbaum, Phillips & Harris Co., L.P.A., and *Mr. John A. Harris, III*, for appellant.

Messrs. Shumaker, Loop & Kendrick, Mr. Robert M. Anspach and *Mr. Timothy C. McCarthy*, for appellee.

WILLIAM B. BROWN, J. The case presents us with the question of whether a motion for summary judgment pursuant to Civ. R. 56 should have been granted to appellee. Before considering that issue, however, it is necessary to review first the proper legal standard to be applied to cases alleging a design defect in a manufactured product which causes injury.

I.

Both parties assert that *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 2d 317, is dispositive of this case. In *Temple*, the plaintiff was injured while operating a punch press when a number of aluminum extrusions fell from the bolster plate onto the dual operating buttons. This caused the press

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[1] Appellant also alleged negligence on the part of appellee in the following acts:

"(a) failure to design, properly and adequately said press;

"(b) failure to inspect, properly and adequately said press;

"(c) failure to test properly and adequately said press;

"(d) failure to manufacture properly and adequately said press;

"(e) failure to install or to incorporate known safety devices on said press;

"(f) failure to provide adequate and proper warnings and instructions regarding the dangers of said press."

Appellant's claims in negligence were subsequently dropped and are not considered in this appeal.

Appellant additionally raises upon appeal an argument regarding failure to warn of product defect which is considered at footnote 5, *infra*.

ram to close on her arms. The ram tripping device had been altered, however, by the plaintiff's employer. Specifically, the employer replaced the original shoulder level tripping buttons with buttons waist high. The plaintiff brought an action under, *inter alia,* a theory of strict liability in tort. We affirmed the granting of summary judgment for all defendants.

In *Temple,* we adopted Section 402A of the Restatement of Torts 2d and its comments "[b]ecause there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort. * * * " *Temple, supra,* at page 322. Moreover, the Restatement formulation of strict liability in tort "greatly facilitates analysis in this area." *Id.* Thus, Section 402A of the Restatement of Torts was adopted as a conceptual overlay upon the broader definition of strict liability in tort announced in *Lonzrick* v. *Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 237: "For the plaintiff to recover, he must prove, by the required degree of proof, that the joists were defective, that they were defective at the time the manufacturer sold them, that the defect caused them to collapse while they were being used for their ordinary intended purpose, and that the defect was the direct and proximate cause of the plaintiff's injury, and that the plaintiff's presence was in a place which the defendant could reasonably anticipate." See, also, *State Auto Mutual Ins. Co.* v. *Chrysler Corp.* (1973), 36 Ohio St. 2d 151.

Applying Section 402A(1)(b) to the facts, we held that the alteration of the press by the plaintiff's employer precluded a finding of strict liability against the manufacturer of a defective product because the press did not reach "the user or consumer without substantial change in the condition in which it is sold." It is clear that our holding in *Temple* on the manufacturing defect issue was based upon the evidence of substantial changes in the condition of the press made subsequent to the purchase.

We also held that the plaintiff did not present a genuine issue of material fact on the question of negligent design of the press. Appellee argues strenuously that *Temple* applied equally

to a claim of strict liability design defect as well as negligent design defect and that compliance with the Ohio Industrial Safety Code is a defense to a strict liability claim. This was not the obvious intent of *Temple*. Part III of the opinion, in which the design defect claim is considered, is concerned solely with the issues of defendants' liability for negligence in failing to warn of a dangerous propensity of a product and whether "Wean *negligently* designed the power press." (Emphasis added.) *Temple*, at pages 325-326. The standard applied, then, was one appropriate to the law of negligence: "' * * * [i]t is the duty of a manufacturer to use *reasonable care* under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended. * * * [Citation omitted.]' " *Id.*, at page 326. As a guide in "passing judgment upon the *reasonableness* of a manufacturer's conscious design choice," (emphasis added), *id.*, we looked to statutory regulation, in particular, the Industrial Commission Safety Code.

Temple, supra, did not, therefore, provide a legal standard for the application of strict liability in tort to design defects. We turned to that task in *Leichtamer* v. *American Motors Corp.* (1981), 67 Ohio St. 2d 456.

In *Leichtamer* we reviewed the policy underlying the development of strict liability in tort and concluded that application of a varying tort standard based upon "[a] distinction between defects resulting from manufacturing process and those resulting from design, and a resultant difference in the burden of proof on the injured party, would only provoke needless questions of defect classification, which would add little to the resolution of the underlying claims. A consumer injured by an unreasonably dangerous design should have the same benefit of freedom from proving fault provided by Section 402A as the consumer injured by a defectively manufactured product which proves unreasonably dangerous." *Id.*, at page 464.

The focus of the inquiry in *Leichtamer* was what constituted a "defective condition unreasonably dangerous"[2] as formulated by Section 402A of the Restatement of Torts. We adopted a variation of the familiar "consumer expectation test" of Comment *i* to Section 402: "A product is in a defective condition unreasonably dangerous to the user or consumer if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Leichtamer,* paragraph two of the syllabus. This standard followed as a logical development from commercial warranty origins of strict liability in tort. See *Lonzrick* v. *Republic Steel Corp., supra,* at page 235; *Temple* v. *Wean United, supra,* at pages 320-321. It reflected "the commercial reality that '[i]mplicit in *** [a product's] presence on the market *** [is] a representation that it [will] safely do the jobs for which it was built.' *Greenman* v. *Yuba Power Products* [citation omitted]." *Id.,* at page 466.

Unlike the factual setting in *Leichtamer,*[3] there are situations in which "the consumer would not know what to expect,

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[2] The Restatement formulation of strict liability in tort has come under considerable criticism for appearing to impose a dual requirement that an injured plaintiff prove that a product is both "defective" and "unreasonably dangerous." See, *e.g.* Beasley, Products Liability and the Unreasonably Dangerous Requirement, pages 57-94. To require an injured plaintiff to prove both that a product contained a defect and that the defect rendered the product "unreasonably dangerous" would place a greater requirement upon him than required by our initial formulation of strict liability in tort announced in *Lonzrick* v. *Republic Steel Corp., supra.* Moreover, the examples in Comment *i* to Section 402 A of the Restatement make clear that the unreasonably dangerous terminology was adopted by the American Law Institute to distinguish defective products from those foods or drugs which necessarily involve some risk of harm, if only from over consumption (such as sugar is dangerous to a diabetic). Accordingly, we focus our inquiry on the nature of "defect" and dispense with any requirement for strict liability in tort that a defect be unreasonably dangerous.

[3] In *Leichtamer,* the plaintiffs were injured while riding in a Jeep Model CJ-7 on an off-the-road course. The vehicle had overturned and its rollbar failed to provide any protection to the passengers. The plaintiffs adduced evidence that the defendant designer-manufacturer had advertised the vehicle as safe for off-the-road use, thus creating an expectation in the users of the vehicle.

because he would have no idea how safe the product could be made." Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 829. See, also, Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855, at page 861. Such is the case *sub judice*. Difficulty could arise, for example, where the injured party is an innocent bystander who is ignorant of the product and has no expectation of its safety, or where a new product is involved and no expectation of safety has developed. Conversely, liability could be barred hypothetically where industrial workmen "gradually learn of the dangers involved in the machinery they must use to make a living and come to 'expect' the dangers." Beasley, Products Liability and the Unreasonably Dangerous Requirement, pages 88-89. In such cases, the policy underlying strict liability in tort,[4] requires that "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." *Barker* v. *Lull Engineering Co.* (1978), 20 Cal. 3d 413, 430, 573 P. 2d 443.

Accordingly, we hold that a product design is in a defective condition to the user or consumer if (1) it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the benefits of the challenged design do not outweigh the risk inherent in such design. Factors relevant to the evaluation of the defectiveness of the product design are the likelihood that the product design will cause injury, the gravity of the danger posed, and the mechanical and economic feasibility of an improved design. Cf. *Barker* v. *Lull Engineering Co., supra,* at page 431; *Phillips* v. *Kimwood Machine Co.* (1974), 269 Ore.

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4 " • • • the policy underlying the doctrine [is] that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm." *Leichtamer, supra,* at pages 464-465.

485, 525 P. 2d 1033; and Wade, On the Nature of Strict Tort Liability for Products, *supra,* at pages 837-838.[5]

II.

Civ. R. 56(C) provides that summary judgment shall be rendered if there is no genuine issue as to any material fact; if the moving party is entitled to judgment as a matter of law; and if it appears from the evidence that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in his favor.

Applying this standard to both the facts of record and to the principles of strict liability in tort discussed, *supra,* we conclude that appellant has made out genuine issues of fact of whether appellee's press design was defective by allowing accidental tripping of the foot pedal control and in failing to provide a point of operation guard when the foot pedal is operative. Specifically, appellant provided an affidavit of James J. McCarthy, a former safety engineer for General Motors Corporation, involved with analysis of machine accident potential. McCarthy's affidavit states, *inter alia,* that in his opinion the press is defective "because of inadequate guarding at the point of operation caused by failure to attach a barrier or interlock gate guard to prevent entry of the operator's hands into the danger area while the ram is descending * * * the press is defective because of inadequate guarding of the foot pedal of the foot switch to prevent inadvertent entry and tripping."

[5] Appellant also offers the proposition that "the failure to give adequate warnings gives rise to a cause of action in strict liability." As we pointed out in *Temple,* at page 325, "[i]t is * * * apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort result from the failure to meet this duty is, in essence, a negligent act." Appellant, however, abandoned his claim in negligence.

Moreover, we held in *Leichtamer,* at page 469, that "[t]he absence of a warning does not, without more, provide a basis for [strict] liability; rather, evidence of warning is in the nature of an affirmative defense to a claim that a product is unreasonably dangerous."

Appellant also offered the deposition of Simon Tammy, a mechanical engineer, in which he testified that the foot switch creates unique hazards which should be prevented by use of a point of operation guard. Appellant's own deposition indicates the accident occurred when she was attempting to pull the foot switch toward her by use of her foot, but that she was not intentionally attempting to activate the foot switch.

Construing this evidence most strongly in favor of appellant, we hold that reasonable minds cannot come to but one conclusion on the defectiveness of the design of the foot switch and the absence of a point of operation guard. Accordingly, for the foregoing reasons, the judgment of the Court of Appeals is reversed.

Judgment reversed.

CELEBREEZE, C. J., LOCHER and MCCORMAC, JJ., concur.

SWEENEY, HOLMES and KRUPANSKY, JJ., dissent.

MCCORMAC, J., of the Tenth Appellate District, sitting for C. BROWN.

HOLMES, J., dissenting.

I respectfully dissent. I continue to adhere to my position, articulated in my dissent in *Leichtamer* v. *American Motors Corp.* (1981), 67 Ohio St. 2d 456, 477, that a manufacturer may not be held liable for the defective design of a product in the absence of a showing that the manufacturer was negligent in the design of the product.[6] Nevertheless, in my opinion, there is no basis for imposing liability here, regardless of what standard is applied.

It is uncontroverted that the press that injured the appellant was fitted with hold-back guards which were designed to assure that the operator's hands and arms were out of the die area when the ram descended. The manufacturer produced this

[6] Clearly, under negligence principles, this court's holding in *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 2d 317, would preclude finding the appellee liable.

type of press with variable points of operation. The press could be obtained with two hand surface operating buttons, or a foot operable model which comes supplied with hand and arm hold-back guards. The employing company here selected the latter type of equipment. The appellant was instructed in the proper use of the guards and repeatedly warned not to place her hands in the press area without using the hold-back guards, yet appellant was injured when she put her hands in the press without using the guards. Had appellant followed the instructions and warnings, this unfortunate accident would not have occurred.

In my view, reasonable minds could come to but one conclusion: the press was not in a defective condition. Where a press, such as the one here, is equipped with safety devices which are sufficient to protect the operator—if used—and the operator is informed about the devices, I would hold that as a matter of law the press is not defective.

The majority opinion would render the manufacturer of any machinery absolutely liable for any and all injuries received by the user however careful the company may be in the design of the product and however careless the individual might be in the use thereof. This should not be the law.

Accordingly, I would affirm the judgment of the Court of Appeals.

SWEENEY and KRUPANSKY, JJ., concur in the foregoing dissenting opinion.

KRUPANSKY, J., dissenting. I agree with the finding of the courts below that the punch press at issue contains no design defect as a matter of law. Accordingly, I must respectfully dissent from this court's decision reversing the summary judgment rendered in the defendant's favor.

This court stated in *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 2d 317, at 321:

"It is now well established that, in order for a party to recover based upon a strict liability in tort theory, it must be

proven that: '(1) There was, in fact, a defect in the product manufactured and sold by the defendant, (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss.' *State Auto Mutual Ins. Co.* v. *Chrysler Corp.* (1973), 36 Ohio St. 2d 151."

There are several reasons I do not feel the plaintiff has fulfilled the three provisions set forth in *Temple.* Firstly, the machine involved herein was equipped with a two-hand, button-tripping device which Ohio Industrial Commission Regulation IC-5-08.03(B)(1)(c) sanctions as an acceptable means of guarding a power press.[7] The significance of complying with Industrial Commission Regulations was established in *Temple* where we stated at page 327:

"In view of this regulation [IC-5-08.03], which specifies that either a fixed barrier guard or a two-hand tripping device (with which this press was equipped) are acceptable methods of guarding, this court holds that the question of whether or not the manufacturer was negligent in not providing fixed barrier guards should be answered, *as a matter of law,* in the negative." (Emphasis added.)

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[7] Ohio Industrial Commission Regulation IC-5-08.03, dealing with power presses, reads in relevant part:

"(A) GUARDING

"(1) Construction

"Every power press in use shall be constructed, or shall be guarded to prevent the hands or fingers of the operator from entering the danger zone during the operating cycle.

(B) ACCEPTABLE METHODS OF GUARDING

(1) Manual Feed Presses, by:

(a) Gate Guard

(b) Fixed Barrier Guard

(c) Sweep Guard

(d) Pull and Restraint or Hold-back Guard

(e) Two-Hand Tripping Device

(f) Limitation of ram stroke

(g) Electronic Guard

(h) Photoelectric or Selenium Guard

(i) Magnetic Guard

(j) Use of Special Tools"

Admittedly, *Temple* dealt with compliance under Industrial Commission Regulations in the context of a negligence action, however, the underlying premise should not change simply because the cause of action is phrased in terms of strict liability, as opposed to negligence. The Ohio Industrial Commission has been granted the authority to promulgate safety standards for the various industries. A manufacturer who fully complies with these standards in designating and constructing his products should be secure that his product is of reasonable design as a matter of law, thus insulating him from liability for design defects. The Industrial Commission Regulations should create safeguards not only for consumers and employees, but for manufacturers as well.

Notwithstanding the defendant's compliance with IC-5-08.03, the plaintiff asserts this press was defective because the machine as shipped included a foot pedal which rendered the two-hand, button-tripping device inoperable. I do not agree with plaintiff that defendant's addition of a foot pedal *at the request of plaintiff's employer* rendered this machine defective. Furthermore, even if the two-hand, button-tripping device in combination with the foot pedal could be characterized as a "defect," still the punch press itself is not "defective" due to the pull and restraint or hold-back guard, an additional safety device, which was affixed to the machine at the time of plaintiff's accident. The pull and restraint or hold-back guard is another "acceptable method of guarding" a manual feed press within Industrial Commission Safety Code IC-5-08.03. Therefore, even assuming the press was "defective" prior to the addition of the pull and restraint or hold-back guard, subsequent to its addition the machine could no longer be deemed defective. Moreover, whether this safety device was added by the defendant or by the plaintiff's employer is immaterial. The relevant determination is whether the machine was defective at the time of plaintiff's injury, for if no defect existed at this time then clearly the accident did not result from a defect in the press.

At the time of this accident the plaintiff was not wearing the pull and restraint or hold-back guard provided. Plaintiff's witnesses indicated this injury would never have occurred had the plaintiff been wearing this safety device as instructed. Consequently, it was plaintiff's failure to wear the available safety device which was the sole cause of her injury, and not any defect in the punch press which she was operating.

In sum, I feel as a matter of law the design of the manual feed press used by the plaintiff was not defective at the time of sale, nor was it defective at the time of plaintiff's injury. Accordingly, I would have affirmed the judgment of the Court of Appeals.

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ,
Plaintiff,

vs

MINSTER MACHINE COMPANY,
Defendant.

Case No. 78-1653
JUDGMENT ENTRY AND OPINION
Filed February 19, 1980

This cause is before the Court on cross motions for summary judgment and the briefs, exhibits and affidavits filed in support thereof. Plaintiff, having abandoned her claim in negligence, states a cause of action for strict liability in tort for defective design against the manufacturer of a 60-ton, open back, inclinable press which she was assigned to operate in the scope of her employment. Defendant manufacturer of the press has denied plaintiff's allegation, insisting that the press was not defective when it left the defendant's control or at the time of the injury, and that, regardless, the design of the press, including the safety devices installed thereon, was not the proximate cause of plaintiff's injury.

Briefly, the undisputed facts demonstrate that plaintiff's employer, Toledo Die and Operating Company, purchased the aforementioned press in 1971, equipped with a dual button safety device for activating the machine. In placing the order, plaintiff's employer requested that an independently-wired foot switch, operated by a foot pedal, be installed so that the machine would more readily conform to the employer's operation. The manufacturer's bulletin, which accompanied the press, warned the purchaser that implementation of a foot switch activation device would effectively cancel the safety feature of the dual-button device installed by the manufacture thus necessitating the implementation of an additional safety device to protect the operator. Consequently, following delivery and installation of the press in the purchaser's plant, pull back

straps were attached by the purchaser to the machine, which would effectively pull the operator's hands out of the danger area when the machine was activated by either the foot switch or the palm buttons.

However, at the time of injury, plaintiff was not actually operating the machine for its intended use. According to the record, she left her machine momentarily, unfastening the pull back straps to find a more confortable stool to sit on. Upon returning to the machine, she found that the foot pedal had been moved slightly by someone emptying metal scraps from underneath. While plaintiff was attempting to readjust the foot pedal with her foot and, at the same time, to place the new stool in position, her hand came to rest in the operating area and was partially amputated when her foot accidentally activated the foot switch. Thus, plaintiff alleges that the press was defectively designed because of the absence of gate guards protecting the hands from the operating area and because of inadequate guarding of the foot pedal.

Initially, it is noted that the plaintiff has the burden of proving three elements in order to recover in products liability for defective design: (1) that a defect existed in the manufactured product; (2) that such defect existed at the time the product left the hands of the manufacturer; and (3) that such defect was the direct and proximate cause of plaintiff's injuries. *Temple v. Wean Utd., Inc.*, 50 Ohio St. 2d 317, 321, 4 Ohio Op. 3d 466, 264 NE2d 267 (1977), citing *State Auto Mutual Insurance Co. v. Chrysler Corp.* 36 Ohio St. 2d 151 (1973). A defect is said to exist when the product is not of good and merchantable quality fit and safe for its ordinary intended use. *Id.* The duty of the manufacturer, in respect to its liability for defective design, is to exercise reasonable care under the circumstances to design a product so as to make it not accident or foolproof, but safe for the use for which it is intended. *Id.* at 326, citing *Gossett v. Chrysler Corp.*, 359 F.2d 84, 87 (6th Cir. 1966).

In *Temple v. Wean Utd.*, 50 Ohio St. 2d at 327-28, the Ohio Supreme Court had no difficulty in dismissing the plaintiff's

claim on summary judgment, finding that reasonable minds could come to but one conclusion, that the proximate cause of injury was the employer's re-positioning of the safety buttons at waist level. Furthermore, the Court found that the manufacturer's installation of a dual button activation system, which was listed in the Industrial Commission's Safety Code as an approved guarding method, was sufficient, as a matter of law, to establish that the press was not defectively designed when it left the manufacturer.

Subsequently, both Judge Walinski of the Northern District of Ohio, in *Phillips v. Dreis and Krump Mfg. Co.*, Unreported No. C78-64 (N.D. Ohio Mar. 30, 1979), and Judge McQuade of the Fulton County Court of Common Pleas, in *Lichtenwald v. Perkins Machine Co.*, Unreported No. 19393 (Fulton Cty. C.P. Nov. 23, 1979), have relied on *Temple v. Wean Utd.* to hold that compliance with one or more of the approved methods of guarding listed in the Industrial Commission's Safety Code is determinative on the issue of defective design.

In *Phillips*, the press brake in question had only a dual palm button safety device and a removable foot pedal, while in *Lichtenwald v. Perkins*, push buttons, a foot pedal, and a supplemental rubber wand, used an additional safety device, were all employed. Both cases were resolved for the defendant manufacturer on motions for summary judgment. The Sixth District Court of Appeals, on the other hand, has found both defective design and proximate cause to be issues for the trier of fact, *Prentiss v. Kirtz*, 54 Ohio App. 2d 56, 8 Ohio Op.3d 59, 374 NE2d 429 (Erie Cty. 1977), but it is important to note that the court's decision was rendered prior to the *Temple* decision and the Sixth District has not ruled on the propriety of summary judgment under such circumstances since.

Therefore, in light of *Temple v. Wean Utd.*, it is the opinion of this Court that the 60-ton press in question did not leave the manufacturer in a defectively designed condition, since an approved safety device, the dual button activation system, was installed thereon. Furthermore, even if this Court were to find

that the design of the press was defective, in that the foot switch negated the dual button safety device, there is no evidence in the record that such condition was the proximate cause of plaintiff's injury. Rather, plaintiff's injury, which could have been prevented if the pull back straps had been fastened at the time, resulted from a unique, unexpected set of circumstances, for which neither the design of the machine nor the manufacturer can be held responsible.

It is therefore ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment be, and hereby is, denied and that defendant's motion for summary judgment be, and hereby is, granted. Plaintiff to pay costs.

.....

JUDGE

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ
Plaintiff-Appellant

v.

MINSTER MACHINE CO.
Defendant-Appellee

C.A. No. L-80-124
C.P. No. CV78-1633
OPINION
Decided: Dec. 19, 1980
Filed Dec. 19, 1980

Mr. John A. Harris III, Attorney for Appellant.

Messrs. Robert M. Anspach and Timothy C. McCarthy, Attorneys for Appellee.

* * *

POTTER, P.J. This appeal is from a judgment entry and opinion of the Lucas County Court of Common Pleas which granted defendant-appellee Minster Machine Company's motion for summary judgment and denied plaintiff-appellant Virginia Mae Knitz's motion for summary judgment. The trial judge, in his judgment entry and opinion, stated in part as follows:

> "* * * Therefore, in light of Temple v. Wean Utd., it is the opinion of this Court that the 60-ton press in question did not leave the manufacturer in a defectively designed condition, since an approved safety device, the dual button activation system, was installed thereon. Furthermore, even if this Court were to find that the design of the press was defective, in that the foot switch negated the dual button safety device, there is no evidence in the record that such condition was the proximate cause of plaintiff's injury. Rather, plaintiff's injury, which could have been prevented if the pull back straps had been fastened at the time, resulted from a unique, unexpected set of circumstances,

for which neither the design of the machine nor the manufacturer can be held responsible.* * *"

On August 23, 1976, appellant was employed by Toledo Die and Manufacturing Company as a machine operator. While plaintiff-appellant was preparing to operate a press manufactured by defendant-appellee, plaintiff-appellant had the tips of two fingers amputated by the press. Plaintiff-appellant's complaint alleged four theories of defendant-appellee's liability for the accident. These were negligence, breach of express and implied warranties, breach of contract and sale of a product in a defective condition. Appellant requested damages not in excess of $500,000.

At the time of the accident plaintiff-appellant had been employed by Toledo Die and Manufacturing Company for approximately one week and was using the press manufactured by defendant-appellee for the first time. Plaintiff-appellant did have previous work experience with similar presses. According to plaintiff-appellant's testimony at her deposition, she received some brief instruction from a foreman about running the press and was told to always wear the pull and restraint or hold-back guards when operating the machine. The pull and restraint or hold-back guards were a safety device which pulled the operator's hand out of the area of the press when the press was activated. A foot pedal was used to activate the press.

Plaintiff-appellant ran some pieces through the press and then got up to get a more comfortable stool. When she returned to the press, she discovered someone had emptied the tray for trim parts, and had moved the foot pedal. Without reattaching the pull and restraint or hold-back guards, appellant attempted to move the foot pedal into position with her foot. She put her right hand in the press area while she was adjusting the foot pedal, and inadvertently activated the press, resulting in the amputation of the tips of her fingers. Plaintiff denies that she had her toe in the guarded foot pedal box.

Appellant's first assignment of error is:

"The Trial Court's ruling that the press was not defective at the time it was sold by the manufacturer was contrary to law.

"A. A power press which is designed, manufactured and sold without operable guarding is defective as a matter of law.

"B. A press is defective where a single foot switch creates a risk of injury to the operator by accidental tripping and a different design or other protective devices can avoid such risk of harm.

"C. Ohio law mandates adequate warning of all latent dangers and failure to adequately warn makes the product defective."

In Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, the Ohio Supreme Court approved Section 402A of the Restatement of Torts as the standard to be used by Ohio courts in strict liability actions brought against manufacturers for defective design of their product.

In bringing an action based upon strict liability the Plaintiff must prove the following elements:

" '(1) There was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss.' " (Citation omitted). Temple v. Wean United, Inc., supra, at 321.

The fact situation in Temple v. Wean United, supra, is similar to the case sub judice. Mrs. Temple's arms were crushed when a power press closed on her arms after being activated by objects falling onto the dual operating control buttons. The court found no liability for the manufacturer because the placement of the dual control buttons had been substantially altered by Mrs. Temple's employer.

The court in Temple v. Wean United, Inc., supra, further indicated that as an aid in setting standards of liability for a manufacturer in the manufacturer's design of his products, the court should look to statutory regulations.[1]

[1] Other states have not reached this same result in considering defects in design of power presses. See 96 ALR 3d 22, Sections 30, 31.

The court found that the press manufactured by Wean United did comply with Industrial Safety Code IC-5-08.03 requiring guarding of power presses in that the press was equipped with a two hand tripping device at the time the press left the manufacturer. The court stated:

> "In view of this regulation, which specifies that either a fixed barrier guard or a two-hand tripping device (with which this press was equipped) are acceptable methods of guarding, this court holds that the question of whether or not the manufacturer was negligent in not providing fixed barrier guards should be answered, as a matter of law, in the negative." Temple v. Wean United, Inc., supra, at 327.

The Ohio Supreme Court's reliance upon statutory regulations to decide the issue of defective design has been viewed both positively, see Strause and Hedden, Liability for Product Design in Ohio—A First Step Toward Solution, 11 Akron L. Rev. 663 (1978), and negatively, see Werber, Strict Liability Comes of Age in Ohio: Almost, 11 Akron L. Rev. 679 (1978), by legal commentators.[2]

The order of the Industrial Commission, Industrial Commission Safety Code IC-5 utilized by the court in Temple v. Wean United, Inc., supra, is applicable here since both cases involve the safety standards for power presses. Industrial Commission Safety Code IC-508.03 authorizes the following methods of guarding for a manual feed press:

> "(B) ACCEPTABLE METHODS OF GUARDING
> (1) Manual Feed Presses, By:
> (a) Gate Guard (see p. 44)
> (b) Fixed Barrier Guard (see p. 44)
> (c) Sweep Guard (see p. 45)

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[2] The court, in Temple v. Wean United, Inc., supra, cites another law review article, Henderson, Judicial Review of Manuafacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531 (1973), relative to the, "difficulty and openendedness inherent in passing judgment upon the reasonableness of a manufacturer's conscious design choices." See, for example, Henderson at p. 1556, where the author states, "* * * it must be recognized that legislatures and agencies can never completely occupy the field of product design."

(d) Pull and Restraint or Hold-Back Guard (see p. 45)
(e) Two-Hand Tripping Device (see p. 45)
(f) Limitation of ram stroke (see IC-5-08.03) (E)
(g) Electronic Guard (see p. 44)
(h) Photoelectric or Selenium Guard (see p. 45)
(i) Magnetic Guard (see p. 44)
(j) Use of Special Tools (see IC-5-08.03 (F))"

The record is clear that defendant-appellee's machine was equipped with a two button tripping device at the time the press was manufactured. The record is also clear that at the time of the accident the press was equipped with a pull and restraint or hold-back guard as required by Industrial Commission Safety Code IC-508.03. Plaintiff-appellant was not wearing this device at the time the accident occurred. Testimony of both plaintiff-appellant's and defendant-appellee's witnesses indicated that if Mrs. Knitz had been wearing this device, as she had been instructed to do when working around the press, the accident would not have occurred.

Plaintiff argues, however, that the machine was defective because it was shipped with the foot pedal, and the use of the foot pedal made the two-button tripping device inoperable. Even if it is conceded that this was a defect, which this court does not find, nevertheless the press was not defective because the press was equipped with the pull or restraint and hold-back device at the time of the accident. This alleged defect was not the proximate cause of plaintiff-appellant's accident. Therefore, we hold, based upon the authority of Temple v. Wean United, Inc., supra, that defendant-appellee was not liable as a matter of law. See also Phillips v. Dreis and Krump Mfg. Co., Federal District Court, N.D. Ohio, March 30, 1979 (unreported); Lichenwald v. Perkins Machine Co., No. C78-64, Fulton County Court Common Pleas, No. 19393 (unreported), November 23, 1979.

Plaintiff-appellant raises several arguments to the effect that Temple v. Wean United, Inc., supra, which we must follow, is inapplicable in the case sub judice. First, plaintiff-appellant argues that although defendant-appellee sold the press with a two-button hand control, defendant-appellee also

sold with the press a foot pedal. The attachment of the foot pedal to the press made the two-button hand control inoperable. Plaintiff-appellant therefore argues that the press was defectively designed because use of the foot pedal negated the safety feature, and, therefore, some other method of guarding should have been designed by the manufacturer. We disagree. The press was equipped with a safety device, the two-button hand control, which complied with Industrial Safety Code IC-508.03 at the time it was manufactured. The press was also equipped with another safety device, the pull and restraint or hold-back device, which also complied with Industrial Safety Code IC-508.03 at the time of the accident. The fact that plaintiff-appellant's employer, and not the defendant-appellee manufacturer, attached the pull and restraint or hold-back guard device does not make the defendant-appellee liable for defective design since the defect, if any, had been corrected. See for example Rios v. Niagra Machine & Tool Works (1974), 59 Ill. 2d 79, 319 N.E. 2d 232.

Plaintiff-appellant also argues that the press was defective because the means for guarding the foot pedal from accidental tripping was defective. In making this argument plaintiff-appellant is focusing on one component of the press in making her defective design argument. We find no merit in this approach. The design of the press should be viewed in its entirety, considering all safety devices which are attached to the press. Therefore, since the press was equipped with the pull and restraint or hold-back device at the time of the accident, there was no defect as a matter of law, Temple v. Wean United, Inc., supra.

Finally, plaintiff-appellant argues that Ohio law imposes liability on a manufacturer for failure to warn about a possible danger from use of the product and failure to warn makes the product defective.[3] A more accurate statement of the liability of

[3] We have some questions as to whether plaintiff-appellant effectively preserved this issue for appeal. Although this legal theory is raised in plaintiff-appellant's pleadings, plaintiff-appellant does not clearly raise this issue in his brief in favor of plaintiff-appellant's motion for summary judgment or in his brief in support of his motion in limine. Plaintiff-appellant failed to file a brief in opposition to defendant-appellee's motion for summary

a manufacturer for failure to warn is set forth in Temple v. Wean United, Inc., supra, as follows:

> "* * * the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort resulting from the failure to meet this duty is, in essence, a negligent act. See Prosser on Torts (4 Ed.), Section 96. In Ohio, the case law has established that a manufacturer or vendor is negligent when he has knowledge of a latent defect rendering a product unsafe and fails to provide a warning of such defect. Sams v. Englewood Ready-Mix Corp. (1969), 22 Ohio App. 2d 168; Burns v. Pennsylvania Rubber & Supply Co. (1961), 117 Ohio App. 12." Temple v. Wean United, Inc., supra, at 325.

See also Restatement of Torts 2d, § 388, § 402A, Comments h and i. This duty to warn of an unreasonably dangerous product exists even though no defect in design or manufacture is present in the product. See 53 ALR 3d 239, § 3.

When we review the record we find that defendant-appellee is not liable for failure to warn. First, the record is clear that defendant-appellee furnished warnings to Toledo Die and Manufacturing Company regarding the danger of using a foot pedal with the machine. Its bulletin stated in part:

> "Please Note: Minster does not recommend use of a foot control as the means for controlling motion of the press slide. Press users should make every effort to eliminate the type of operation that requires a foot control. In those cases where it is not practical to control the press stroke by other means, the foot control may be used, but only if point-of-operation safeguarding complying with B11.1, or other codes, standards, and laws is installed by the em-

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judgment. He referred the court instead to his briefs in support of his motion for summary judgment and his brief in support of his motion in limine. Defendant did raise this issue in his brief in support of his motion for summary judgment, but the trial judge does not discuss this issue in his judgment entry. We can find nothing in the record to indicate that the plaintiff-appellant objected to this omission.

ployer. The type of safeguard used must conform to published Federal regulations (O.S.H.A.)."

A warning given by a manufacturer to an employer's supervising personnel is considered sufficient to give an employee notice of possible danger if the employee will be supervised in use of the product. See, for example, Jacobson v. Colorado Fuel & Iron Corp. (9 Cir. 1969), 409 F. 2d 1263. Plaintiff-appellant's employer, Toledo Die & Manufacturing Company, heeded this warning in that Toledo Die & Manufacturing Company attached pull and restraint or hold-back devices to the press on which plaintiff-appellant was injured.

Plaintiff-appellant also received warnings about the dangerousness of the press from supervising personnel at Toledo Die & Manufacturing Company. Russell Bowling, a die setter at Toledo Die & Manufacturing, testified at his deposition that in the week prior to the accident he had seen the plaintiff-appellant operating a similar press without the pull and restraint or hold-back devices and had told plaintiff-appellant to use this safety device at all times when working around the press.

According to Bowling, new press operators were told to never put their hands in the press area unless their pull and restraint or hold-back guards were attached. Bowling also stated that he believed there was a warning on the press telling the press operator to use the pull and restraint guards or hold-back devices when working around the press. The press was partially destroyed by a fire subsequent to plaintiff-appellant's accident, so the accuracy of this statement of Bowling cannot be verified.

In addition, we question whether plaintiff-appellant needed to be warned about the danger of attempting to move the foot pedal of the press by placing her foot in the same position she used to activate the press. The danger of inadvertently activating the press was an obvious danger and required no warning. See 53 A.L.R. 3d, 239, Section 7.

Finally, we respond to the argument raised by amicus curiae, Toledo Trial Lawyers Association, on behalf of plaintiff-

appellant. The argument of amicus curiae is essentially that, although the decision in Temple v. Wean United, Inc., supra, is dispositive of the issue of defendant-appellee's liability for negligence in design as a matter of law, since the press manufactured by defendant-appellee did comply with the Industrial Commission Safety Code IC-5-08.03, plaintiff-appellant still has a cause of action against defendant-appellee, based upon strict liability in tort.

This court has previously held in the first syllabus of Jones v. White Motor Corp. (1978), 61 Ohio App. 2d 162:

> "1. In a products liability case, where a claim is asserted against a manufacturer for the defective design of its product, the strict liability principle of 2 Restatement of Torts 2d, Section 402(A) and the negligence principle of Section 398 merge; the standard of conduct required of the manufacturer is that of reasonable care in design, and the manufacturer is liable to those whom it could expect to use the product as intended or be endangered by such use, including bystanders."

This statement in Jones v. White Motor Corp., supra, makes clear that the same standard of conduct for reasonableness in design is applicable in strict liability actions and negligence in design actions.

Therefore, we find no merit to the argument of amicus curiae that there is a different standard of conduct in a strict liability action based upon a defective product than there is in a negligence action based upon a defective product. We find appellant's first assignment of error is not well taken.

Appellant's second assignment of error is as follows:

> "SECOND ASSIGNMENT OF ERROR
>
> "THE TRIAL COURT'S RULING THAT EVEN IF THE PRESS WAS DEFECTIVE, IT WAS NOT A PROXIMATE CAUSE OF INJURY TO THE PLAINTIFF IS CONTRARY TO LAW.
>
> "I. NO ACT OF PLAINTIFF'S EMPLOYER BROKE THE CHAIN OF CAUSATION.

"A. A MANUFACTURER IS UNDER A NON-DELEGABLE DUTY TO DESIGN, MANUFACTURE AND SELL A PRODUCT WHICH IS REASONABLY FIT, SUITABLE AND SAFE FOR ITS INTENDED OR REASONABLY FORESEEABLE PURPOSES.

"B. A DEFECTIVE MACHINE WHICH INJURES THE USER IS THE PROXIMATE CAUSE OF THE INJURY UNLESS AN INTERVENING ACT SUBSTANTIALLY INCREASED THE HAZARD AND THE INTERVENING ACT IS NOT FORESEEABLE BY THE MANUFACTURER.

"II. NO ACT OF THE PLAINTIFF BROKE THE CHAIN OF CAUSATION.

"A. PLAINTIFF'S CONTRIBUTORY NELIGENCE, IF ANY, IS NO DEFENSE IN A STRICT PRODUCTS LIABILITY ACTION.

"B. ASSUMPTION OF THE RISK IS NO DEFENSE IN A DESIGN DEFECT CASE WHEN PLAINTIFF, AN EMPLOYEE IN AN INDUSTRIAL SETTING, USING THE MACHINE IN AN INTENDED OR REASONABLY FORESEEABLE MANNER IS INJURED BECAUSE OF THAT DEFECT, AND IN THE ABSENCE OF THAT DEFECT, THE INJURY WOULD NOT HAVE OCCURRED."

The portion of the trial court's judgment entry and opinion as to which plaintiff-appellant is objecting in this assignment of error is as follows:

> "Furthermore, even if this Court were to find that the design of the press was defective, in that the foot switch negated the dual button safety device, there is no evidence in the record that such condition was the proximate cause of plaintiff's injury. Rather, plaintiff's injury, which could have been prevented if the pull back straps had been fastened at the time, resulted from a unique, unexpected set of circumstances, for which neither the design of the machine nor the manufacturer can be held responsible."

Defendant-appellee argues in its brief that the proximate cause of plaintiff-appellant's accident was her failure to attach the pull and restraint or hold-back device. Plaintiff-appellant disagrees and argues the proximate cause of plaintiff-

appellant's injury was defendant-appellee's breach of duty in failing to install adequate methods of guarding. Although we have briefly alluded to proximate cause in reference to an alleged original defect, we need not further discuss this issue because we have previously held that the press manufactured by defendant-appellee contained no defect as a matter of law based upon Temple v. Wean United, Inc., supra. If there is no defect then the question of proximate cause never arises.

While some of plaintiff-appellant's arguments may have some legal merit, none of these assignments raise issues which are relevant to this appeal. This assignment of error is not well taken.

Appellant's third assignment of error is as follows:

"THIRD ASSIGNMENT OF ERROR

"THE LOWER COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

We find no error in the trial court's denial of plaintiff's motion for summary judgment. The trial court correctly determined that the press manufactured by defendant-appellee was not defective as a matter of law. If the trial court had determined that the press did not comply with the applicable safety codes at the time of plaintiff-appellant's accident, the issue of defective design would have been a question of fact for the jury and plaintiff-appellant would not have been entitled to judgment as a matter of law. Assignment of error No. 3 is not well taken.

Appellant's final assignment of error is as follows:

"FOURTH ASSIGNMENT OF ERROR

"THE LOWER COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE REMAIN NUMEROUS FACTUAL DISPUTES FOR RESOLUTION BY THE JURY."

The trial court applied the proper standard in granting defendant-appellee's motion for summary judgment. See Temple v. Wean United, Inc., supra; Civ. R. 56(C). The

factual questions cited by plaintiff, such as the feasibility of guarding, the inadequacy of warning, and proximate cause were not relevant because there was no defect in the press which caused plaintiff-appellant's injuries. The fourth assignment of error is not well taken.

On consideration whereof, the court finds substantial justice has been done the party complaining and judgment of the Lucas County Court of Common Pleas is affirmed.

Cause remanded to said court for execution for costs. Costs assessed against appellant.

JUDGMENT AFFIRMED.

Connors, J., concurs; Brown, J., dissents.

* * *

BROWN, J., dissents. Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, upon which the defendant-appellant and the majority opinion relies, contains a very well-reasoned analysis and reaches a just result for the defendant in that case. However, the salient, significant facts are so dissimilar from the facts in the case sub judice that Temple properly applied to the facts sub judice is favorable to plaintiff's contentions and requires reversal of the summary judgment granted by the trial court to the defendant.

In Temple, supra, see page 323 thereof, the power press activating buttons were altered or substantially changed by the plaintiff's employer as the court aptly observed:

> "The evidence of record reveals that prior to the date of the accident Superior had a company policy which specified that all power press activating buttons be located facing upward, waist high, 24 inches apart. Pursuant to this policy, upon receipt of the press, Superior altered the existing method of guarding by lowering the buttons, which were at that time shoulder high. Clearly, in relation to the danger of unintentional activation, this alteration

was a 'substantial change' within the meaning of Section 402 A (1) (b). Indeed it is our conclusion that there was no original defect of any sort in the punch press, and that, as a matter of law, Superior's alteration of the safety device, coupled with the utilization of the press for the stamping of stock long enough to bridge the 24 inch gap between the buttons, was the sole responsible cause of the maiming of Mrs. Temple."

In support of this "substantial change" factor the court cited similar cases in support thereof. Hanlon v. Cyril Bath Co. (3d Cir. 1975), 541 F. 2d 343; Keet v. Service Machine Company (6th Cir. 1972), 472 F. 2d 138 and Hardy v. Hull Corp. (9th Cir. 1971), 446 F. 2d 34. By contrast, in the case at bar, plaintiff's employer, Toledo Die and Mfg. Co., did not alter or substantially change any part of the 60-ton open back inclinable press, including its foot pedal activating device. Thus, there was no "substantial change" within the meaning of 402 A (1) (b) in the press which injured plaintiff Virginia Knitz in this case. This difference alone is enough to make Temple not controlling. There are other differences, also.

In Temple, supra, the accident happened, see page 318 of the opinion: "As Mrs. Temple, placed an aluminum extrusion into the back die of the press, an unknown number of extrusions fell from the bolster plate, in front of her onto the dual operating button causing the press to close on her arm, crushing her hands and forearms." Thus, the dual activating buttons at shoulder height, normally used to start the press, were part of the direct and proximate cause of Beverly Temple's injuries. These buttons complied with the fixed barrier guards or the two-hand tripping device requirements of Industrial Commission Safety Code IC-5-08.03.

By contrast, in the case sub judice plaintiff Virginia Knitz was injured, not by the dual activating buttons (two-hand tripping device) accidentally starting the press as in Temple, supra, but by accidentally starting the press when she adjusted the foot pedal while she was not in production, but had her hands in the operation area. The dual activating buttons (two-hand tripping device) and its safety features are totally irrele-

vant to the issues in the case sub judice because the foot pedal device started the press which caused the injuries to plaintiff. Use of the foot pedal to start the press negates and makes irrelevant the safety features of the dual trip button device at shoulder height. Because of this contrast from Temple, supra, via the foot pedal vis-a-vis the dual activating buttons at shoulder height, syllabus 5 of Temple, supra, is inapplicable which holds:

> "Where an order of the Industrial Commission specified that either a fixed barrier guard or a two-hand tripping device is an acceptable method of guarding a power press, a manufacturer is not negligent in designing a press which utilizes a two-hand tripping device."[1]

Since in the Knitz case sub judice the issue of liability for defective design focuses on defendant's design of the foot pedal which activates the press, the contention of defendant and the majority opinion discussing defendant's compliance with Industrial Commission Safety Code IC-5-08.03 with regard to (b) fixed barrier guards and (e) two-hand tripping device becomes totally irrelevant to the issue of defective design liability of defendant. References to testimony that "defendant-appellee's witnesses indicated that if Mrs. Knitz had been wearing this device" referring to a hold-back guard for her arms is (1) entirely unrelated to the claim of defective design of the foot pedal and (2) is an effort to bar plaintiff's claim on the basis of her contributory negligence. Contributory negligence of the plaintiff is no defense to strict liability. Restatement, Torts 2d, Section 402A, Comment n; 63 American Jurisprudence 2d 154, Products Liability, Section 150.

The claim of plaintiff Virginia Knitz, predicated as it is upon defendant's defective design of the foot pedal, in no way

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[1] That part of the opinion at page 327 in support of syllabus 5 is therefore likewise inapplicable which reads:

> "In view of this regulation, which specifies that either a fixed barrier guard or a two-hand tripping device (with which this press was equipped) are acceptable methods of guarding, this court holds that the question of whether or not the manufacturer was negligent in not providing fixed barrier guards should be answered, as a matter of law, in the negative."

needs to wrestle with the theory that "Plaintiff-appellant's employer and not the defendant-appellee manufacturer attached the pull and restraint or hold-back guard device does not make the defendant-appellee liable for defective design since the defect if any had been corrected." See Rios v. Niagra Machine & Tool Works (1974), 59 Ill. 2d 79. The plaintiff concedes the reasonableness of such proposition and is not claiming liability based upon the converse of such proposition.

Since plaintiff has a right to establish liability of defendant on a theory of strict liability in tort plaintiff need not establish negligence of the defendant, a manufacturer, in its design of a product which injures her. For that reason plaintiff need not disagree with nor counter any of the facts, citations or legal principles concerned with negligence in design by a manufacturer, and the principles of no liability for failure of the manufacturer to warn a user, as discussed in the majority opinion from pages 7 through 10.

There is an inherent difference between a claim of negligent manufacture and a claim of strict liability in tort because of a defective product. A claim of negligence focuses on the activities of the manufacturer and whether the manufacturer exercised reasonable care that a manufacturer should exercise. Prosser, The Law of Torts (1971), Section 32; 51 ALR 3d 8, 27. If the manufacturer failed to exercise reasonable care it is liable for the damages proximately resulting.

On the other hand, strict liability in tort focuses on the article manufactured, not on the degree of care exercised by the manufacturer. Under the Restatement Section 402A,[2] it has

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[2] Section 402A (2 Restatement of Torts 2d 347) reads as follows:

"Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

been established as the law in Ohio that the manufacturer's strict liability in tort as defined in Restatement of Torts 2d, Section 402A, is independent of any negligence theory in Temple v. Wean, supra, by reason of the law of the case established in syllabi 1 and 2 thereof as follows:

> "1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> > "(a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "2. The rule stated above applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller."

This holding in Temple, supra, in syllabi 1 and 2, is further clarified as the law in Ohio by the opinion, pages 321 to 322 thereof, as follows:

> "* * * This conception of defectiveness is premised upon Section 402A of the Restatement of Torts 2d, Comment J, which states that: 'In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning * * * as to its use.' Although this court has never expressly adopted Section 402 A as the standard for strict liability in tort, we did, in Lonzrick, supra, cite Section 402A, as well as Greenman v. Yuba Power Products (1963), 59 Cal. 2d 57, 377 P. 896, the first case to apply the principles underlying the section.

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

> Since Greenman was decided, the rule of the Restatement has been adopted or approved by the vast majority of courts which have considered it. Because there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the Restatement of Torts 2d."

If anything this court has said in Jones v. White Motor Corp. (1978), 61 Ohio App. 2d 162, syllabus 1, or in the opinion, is contrary to syllabi 1 and 2 in Temple, supra, or to Section 402A, Restatement of Torts 2d, Jones must yield to the binding legal precedent of Temple, supra.

That the Ohio Supreme Court intended the theory of strict liability in tort to be available in a products liability case without establishing negligence is clear in Temple, supra, at page 325 of the opinion as follows:

> "We have thus far discussed appellees' liability in terms of strict tort liability. It is, however, apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort resulting from the failure to meet this duty is, in essence, a negligent act. * * *
>
> "Appellants contend that the press was negligently designed, in that Wean failed to provide a fixed barrier guard which would prevent the hands or fingers of the operator from entering into the danger zone between the die and the ram. * * *"

The Ohio Supreme Court in Temple, supra, by approving Section 402A, Restatement of Torts, intended that there should be a more burdensome test for the manufacturer in a claim of strict liability that in an action based on negligence. Such higher burden does not permit compliance with a safety regulation to be conclusive on the issue of defective design.

Hubbard-Hall Chemical Co. v. Silverman (1st Cir. 1965), 340 F. 2d 402; Hardaway v. Consolidated Paper Co. (1962), 366 Mich. 190, 114 N.W. 2d 236; Balido v. Improved Machinery Inc. (1973), 29 Cal. App. 3d 633, 105 Cal. Rptr. 890; Berkebile v. Brantly Helicopter Corp. (1971), 219 Pa. Super. 479, 281 A, 2d 707.

The record does not support the trial court's finding that even if the press was in fact defective "there is no evidence in the record that such condition was the proximate cause of plaintiff's injuries." To relieve the manufacturer from liability as a matter of law under the theory of strict liability the intervening action of the employer, or alteration of the product, or the action of the plaintiff, must make the product more dangerous and must be the cause in fact of the injury. Hardy v. Hull Corp. (9th Cir. 1971), 446 F. 2d 34, 35-36; Temple v. Wean, supra, at page 323; Hersh and Bailey, 1 Am. Law of Products Liability 2d (1974), Sec. 1:30 at 94; Hanlon v. Cyril Bath (3d Cir. 1975), 541 F. 2d 343. There was no such intervening action of plaintiff or her employer in the case sub judice.

Although the defense of assumption of risk by plaintiff is available to bar a products liability claim based on strict liability, the record in the case sub judice contains no evidence of assumption of a known risk by plaintiff. In Ohio such defense requires a voluntary assumption of risk by plaintiff containing as elements thereof both a knowledge of a condition and an appreciation of the hazardous or defective nature thereof. Generally, it is a factual issue for jury determination. Wever v. Hicks (1957), 11 Ohio St. 2d 230; Clark v. Becker Discount Drug Co. (Ohio App. 1975), 322 N.E. 2d 679; Good v. Chance (Colorado App. 1977), 565 P. 2d 217; Rudisaile v. Hawk Aviation Inc. (1979), 592 P. 2d 175.

Lastly, the injury to plaintiff Krantz was directly and proximately caused by the defective design of the foot pedal in that it was not guarded as required by Ohio Industrial Commission Regulation IC-5-08.03 which provides:

"Power Presses

"(1) Prevention of Accidental Tripping

"(2) Foot-treadles—guarding

"Foot-treadles used to activate power presses shall be guarded."

That the defective foot pedal permitted accidental or inadvertent tripping is established by the affidavit of James McCarthy, Industrial Safety expert, which stated:

> "The problem is one of most effectively avoiding accidental actuation of the pedal. Now, if it's going to be kicked around on the floor, which is certainly one of the obvious possibilities for moving it around, if someone can move it with a foot rather than getting down on their knees, they're likely to do that. I am not saying that they always will, but it's certainly an expectable thing."

Mr. Tamny testified that this defective foot switch could be corrected by an Allen-Bradley foot switch which "requires at least 3 or 4 distinctly different movements of the foot as opposed to a single foot movement." He further testified that it was feasible to design a foot switch so there is "no reasonable possibility of even getting in there by accident." In a similar case involving a power press and foot pedal switch by the same manufacturer, Minster Machine Company, the U.S. Court of Appeals in Capasso v. Minster Machine Co. (3d Cir. 1976), 532 F. 2d 952 held that "given the testimony of plaintiff's expert" the issue of defect in the press after delivery date was for the jury." As in Capasso, supra, in the case sub judice Minster provided no guard to prevent an operator's hands from entering the point of operation when the press was operated by a foot switch.

For these reasons it is my view the summary judgment for defendant should be reversed.

IN THE COURT OF APPEALS OF LUCAS COUNTY

VIRGINIA MAE KNITZ
Appellant

-VS-

MINSTER MACHINE CO.
Appellee

COURT OF APPEALS NO. L-80-
TRIAL COURT NO. CV78-1633
JOURNAL ENTRY

Date December 19, 1980

Finding all assignments of error not well taken, judgment of the Lucas County Common Pleas Court is affirmed at appellant's costs and cause is remanded to said court for execution for costs. See Opinion by Potter, P. J., and dissent by Brown, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Filed Dec. 19, 1980

JOHN W. POTTER, P. J., and _____
Presiding Judge

JOHN J. CONNORS, JR., J., _____
Judge

CONCUR. _____
Judge

CLIFFORD F. BROWN, J., dissents.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

1982 TERM

VIRGINIA MAE KNITZ,
Appellant,

To wit: March 9, 1982

vs.

No. 81-256

MINSTER MACHINE COMPANY,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

Filed
COURT OF APPEALS
March 10, 1982
Lucas County, Ohio

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. Page .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 9th day of March, 1982.

THOMAS L. STARTZMAN *Clerk.*

By Sam F. Adkins *Deputy.*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

VIRGINIA MAE KNITZ,
Appellant,

vs.

MINSTER MACHINE COMPANY,
Appellee.

1982 Term

To wit: February 26, 1982

No. 81-256

MANDATE

To the Honorable Common Pleas Court.

Within and for the County of Lucas, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN
Clerk

..... 19.....

.....

..... Deputy

RECORD OF COSTS

Docket Fee	$ 20.00	Paid by	Green, Lackey, Nusbaum, Phillips & Harris
Docket Fee	$	Paid by	
Docket Fee	$	Paid by	
Printing Record	$793.36	Paid by	Green, Lackey, Nusbaum, Phillips & Harris
Supplemental Record	$816.78	Paid by	Shumaker, Loop & Kendrick
Sheriff's Costs	$	Paid by	
Sheriff's Costs	$	Paid by	

No. 81-256

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ,
Plaintiff-Appellant,

v.

MINSTER MACHINE COMPANY,
Defendant-Appellee.

MOTION FOR REHEARING AND BRIEF IN SUPPORT

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No. 81-256

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ,
Plaintiff-Appellant,

v.

MINSTER MACHINE COMPANY,
Defendant-Appellee.

MOTION FOR REHEARING

Pursuant to the provisions of Supreme Court Rule 9, Section 1, defendant-appellee, Minster Machine Company, hereby moves this Court for a rehearing.

There are four principal reasons why Minster's motion for rehearing must be granted:

1. The vote of the Chief Justice with the four-justice majority was null and void;

2. Because the vote of the Chief Justice was null and void, failure to grant the motion will itself be violative of Minster's constitutional rights;

3. The majority opinion adopts the *Barker* risk/benefit analysis, an analysis neither discussed nor argued by either party;

4. Since the *Barker* risk/benefit analysis has only now been adopted as the appropriate standard in this case, Minster has not discussed how the *Barker* standard applies to the facts of this case.

All of the foregoing constitute new matter which Minster has had no opportunity to discuss. As demonstrated in the following brief, that opportunity must be given through a rehearing.

Respectfully submitted,

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No. 81-256

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ,
Plaintiff-Appellant,

v.

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Defendant-Appellee.

BRIEF IN SUPPORT OF MOTION FOR REHEARING

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[THE TABLE OF AUTHORITIES HAS BEEN OMITTED]

I. AT THE TIME OF HIS ANNOUNCEMENT ON JANUARY 15, 1982 THAT HE WILL "BE A CANDIDATE FOR GOVERNOR," THE CHIEF JUSTICE BECAME DISQUALIFIED FROM SERVING IN THAT CAPACITY AND HIS VOTE WITH THE MAJORITY IN THE INSTANT CASE IS VOID.

On January 15, 1982, the Chief Justice announced that he "will be a candidate for governor." (See 1/15/82 press release and 1/15/82 *Columbus Dispatch* article attached hereto). At that time, he became a candidate in a party primary for a non-judicial office.

Canon 7A(3) of the Code of Judicial Conduct provides that: "A judge *should* resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, ..." (Emphasis added). The preface to the Code states that: "The canons and text establish mandatory standards unless otherwise indicated."

A "candidate" has been construed to mean "one who seeks the nomination of his political party at a primary election . . . ." *State ex rel. Ranney v. Corey*, 47 N.E.2d 799, 800 (Ct. App. Summit Cty. 1940). *See also: State ex rel. Mazaris v. Gaylord*, 104 Ohio App. 418, 149 N.E.2d 576 (Jefferson Cty. 1957).

The most recent formal opinion from the American Bar Association discussing when a judge should resign for reasons of political candidacy is Formal Opinion 312, August 9, 1964. While construing the Canons of Judicial Ethics, which have since been replaced by the Code of Judicial Conduct, we are unaware of any intent on the part of the Ohio Supreme Court, in adopting the Code, to lower the standards applicable to the judiciary.

Thus, in answer to the question "What do *Canon 28* and the opinions prohibit a judge from doing?" Formal Opinion 312 answered, in pertinent part:

> "13. He should not, while holding his judicial position, become an active candidate for either party at a

primary or general election for an office other than a judicial office. This applies to all judges whether appointed or nominated and elected in a partisan or nonpartisan manner, and extends during the entire tenure as judge.

14. If he decides to become such a candidate, he should resign. This applies to all judges whether appointed or nominated and elected in a partisan or nonpartisan manner, and extends during the entire tenure as a judge."

The Chief Justice, in a speech delivered in the Statehouse rotunda on January 15, 1982, announced that he "will be a *candidate* for governor"; that "I shall then become an *active candidate* for governor"; that "this has been the most difficult and easiest *decision* of my life, but I feel this *decision* is right"; and that he is "confident that my *candidacy* is best for Ohio." (Emphasis added).

The foregoing statements conclusively establish that, on January 15, 1982, the Chief Justice had decided to become an active candidate in a party primary for a non-judicial office. In accordance with the foregoing canon, case law and formal opinion, it is clear that, on January 15, 1982, the Chief Justice "should resign."

Ohio case law has established that the duty to resign is mandatory and not discretionary with the individual judge. The distinction between mandatory standards and permissible guidelines was discussed by Judge Day, writing for an unanimous Cuyahoga County Court of Appeals, in *Cuyahoga County Board of Mental Retardation* v. *Association of Cuyahoga County Teachers of the Trainable Retarded*, 47 Ohio App. 2d 28, 33, 351 N.E.2d 777 (Cuyahoga Cty. 1975) [hereinafter referred to as *"Retardation"*]:

> "In examining the Code of Judicial Conduct it is apparent that while the permissible guidelines are indicated by the use of the word 'may,' the mandatory portions are set forth by the word 'should.' This is entirely consistent with the plain meaning of a word which expresses an obligation or duty." [Citations omitted].

Thus, it was mandatory, and not discretionary, that the Chief Justice resign on January 15, 1982.

The reasons for this policy were explained by a unanimous court in *Mahoning County Bar Association* v. *Franks,* 168 Ohio St. 17, 26-27, 151 N.E.2d 17 (1958):

> "The purpose of such restrictions is to keep judges ever mindful that, even though they may have been nominated in a partisan primary and may have been connected to some extent with partisan politics during their campaign for election (though elected on a nonpartisan ballot), once elected to the judiciary they have assumed an office of public trust which must remain outside and distinct from the 'mainstream' of partisan politics in order to maintain the independence, impartiality and freedom from bias, prejudice and pressure, which the people have a right to expect from their judges.
>
> It is thus apparent that the requirements of Canon 30 that a judge who becomes a candidate for a nonjudicial office shall resign his judicial position and that a judge who is a candidate for a judicial office must exercise caution in engaging in partisan activities are not merely arbitrary rules of conduct laid down by this court, but are requirements bottomed on the premise that the judiciary of the state of Ohio shall be kept as far as possible from the 'mainstream' of partisan politics, all things considered, and that the resignation of a judge who becomes a candidate for a nonjudicial office is a reasonable measure designed to preclude the possibility of the intrusion of partisan politics into the administration of justice and to preclude even the suspicion of such intrusion, which would normally attach to every ruling a judge who retains the bench while a candidate for a nonjudicial office might make, *regardless of his intent or the soundness or justice of such ruling.*" (Emphasis the Court's).

What then was the effect of the Chief Justice's failure to resign on January 15? Given the fact that "Rule IV of the Supreme Court Rules for the government of the Bar of Ohio

provides that the Canons of Judicial Ethics are 'binding' upon all judicial officers of the state," (*Retardation*, 47 Ohio App. 2d at 33), that "[t]he oath of office of a judge * * * provides that a judge will 'discharge and perform all the duties incumbent on him as such judge * * *'," (*Retardation*, 47 Ohio App. 2d at 31), and that "[o]ne of those duties is to conform his conduct to that set forth in the Code of Judicial Conduct," (*Retardation*, 47 Ohio App. 2d at 31), the Chief Justice was "under a compulsory duty" (*Retardation*, 47 Ohio App. 2d at 33) to resign and his "attempt * * * to exercise his authority as a judge in violation of his clear mandatory duty is of absolutely no effect. [Citations omitted]." *Retardation*, 47 Ohio App. 2d at 33.

The appellate court in *Retardation* explained at 33-34:

> "We are not persuaded that these 'mandatory' and 'binding' standards were intended to be empty admonitions which a trial judge could openly disregard, subject only to retrospective disciplinary action against himself, with no effect upon the improper actions which the canons were designed to protect against. Rather, we find that the design and purpose of the Code was to impose a standard of conduct upon judges to which they must conform. The duty of a trial judge under Section 3(C)(1)(d)(i) of the Code of Judicial Conduct, similar to that provided under 28 U.S.C. Section 455 (1975 Supp.) controlling the disqualification of federal judges, is one placed solely upon the individual judge. And like the attempt of a judge to exercise judicial power when prohibited by state or federal statutes, we find that such an attempt as exemplified herein was void. See *In re Dellenbaugh & Burke, supra; United States* v. *Amerine, supra.*
>
> * * *
>
> For these reasons, we hold that the trial judge in the instant case had a mandatory duty from the beginning of the proceedings to disqualify himself from this case, and that his each and every subsequent act, being in violation of his clear and mandatory duty, was utterly void and without effect."

This Court has also recognized that a judge is "without power to hear and determine a cause after disqualification." *Beer* v. *Griffith*, 54 Ohio St. 2d 440, 442, 377 N.E.2d 775 (1978). In that case, however, the majority found that the trial judge's acts were not void because he had not been disqualified in accordance with the specific procedure set forth in Section 5(C) of Article IV of the Ohio Constitution vesting the Chief Justice with the authority and duty to "pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof." Thus, the court held, where there is a specific procedure for determining disqualification, the judge's acts prior to the determination of disqualification by the Chief Justice are not void, but merely voidable.

That, however, is not this case.[1] Here, there is no procedure for determining when a supreme court justice is disqualified. Here, there is merely a constitutional procedure for appointing another justice to sit when "any member of the court shall be unable, by reason of illness, disability or *disqualification*, to hear, consider and decide a cause . . . ." Ohio Const., art. IV, §2 (emphasis added).

By what method is disqualification of a supreme court justice then determined? The disqualifying act itself, when it is a clear and undisputable failure to perform a mandatory duty imposed by a canon of the Code of Judicial Conduct, is self-executing. Disqualification results from performance of the disqualifying act.

This must be so, for, in this instance, "the duty of a * * * judge is one placed soley on the individual judge. And like the attempt of a judge to exercise judicial power when prohibited by state or federal statutes, * * * such an attempt as exemplified herein was void." *Retardation*, 47 Ohio App. 2d at 34.

If this is not the case, a justice of the Supreme Court could simply refuse to disqualify himself in any case, no matter what the reason for which he should be disqualified. Even where the

---

[1] While R.C. 2701.03 and R.C. 2501.13 provide procedures for determining the disqualification of common pleas and appellate court judges, there is no analogous statute applicable to supreme court justices.

grounds for disqualification were based upon consanguinity, bias, or prejudice (which is not the case here), there would be no procedure pursuant to which a party could even seek the disqualification of the justice. While the justice who should have disqualified himself might be subject "to retrospective disciplinary action against himself," this would have "no effect upon the improper actions which the canons were designed to protect against." *Retardation,* 47 Ohio App. 2d at 34.

This cannot be the law of Ohio. Rather, a clearly disqualifying act must itself result in disqualification.

Moreover, it can be no answer that the case had been voted on prior to January 15, 1982, since, having become disqualified on that date, on the date of disposition, February 26, 1982, the Chief Justice was disqualified from participation in the Court's decision. *State v. Pembaur,* 69 Ohio St. 2d 110 (1982).

Thus, having become disqualified on January 15, the Chief Justice's vote with the majority in the instant case is void. Thus, the Court was equally divided and either:

1. the judgment of the court of appeals was therefore affirmed; or

2. the motion for rehearing must be granted and the case must be reargued.

Should this Court refuse either of the above alternatives, the result is violative of Article IV § 2(A) of the Ohio Constitution in that the case was decided by a panel which included a disqualified judge and a judgment was rendered by less than a majority of the Court.

Moreover, refusal to grant the relief requested would also be violative of the Fourteenth Amendment of the United States Constitution in that Minster has been deprived of its right to due process of law by being subjected to the enforcement of a void judgment.

We hasten to point out that it is not Minster's position that all acts of this Court since January 15, 1982 are null and void.

Rather, only those in which the acts of the Chief Justice were determinative, such as the instant case where the decision was rendered by a four-to-three margin in which the Chief Justice was in the majority.

This entire issue would, of course, be moot if Minster's motion for rehearing is granted and the case is heard by a panel of justices duly "qualified" within the meaning of Article IV, § 2(A) of the Ohio Constitution.

II. Failure To Grant Minster's Motion For Rehearing Will Itself Result In Violations Of Minster's Ohio And United States Constitutional Rights.

While it would seem clear from the foregoing that the Chief Justice's vote in this matter is null and void, at the very least, under the circumstances of his disqualification, it was voidable. This, at the minimum, was the Court's holding in *Beer v. Griffith,* 54 Ohio St. 2d 440, 442, 377 N.E.2d 775 (1978).

Assuming, *arguendo,* that the judgment is merely voidable, it became so for the first time in this Court, which is ordinarily a court of last resort. Under such circumstances, where a judgment becomes voidable as a result of an element injected into the case for the first time in the Court of last resort, the party aggrieved has a constitutional right to rehearing.

As this Court has stated:

> "A reading of Article IV of the Constitution of Ohio is convincing that it is the spirit of our fundamental law that a litigant shall be entitled not only to a fair and impartial trial but shall have at least one review if he so desires." *State v. Nickles,* 159 Ohio St. 353, 357, 112 N.E.2d 531 (1953).

Since the judgment herein first became void or voidable in this Court, Minster has a right to "at least one review." Procedurally, that review can be obtained only through the mechanism of a rehearing.

Thus, failure to grant Minster's motion for rehearing will result in violations of its rights under the Fourth Amendment of the Ohio Constitution, as well as its due process rights under the Fourteenth Amendment of the United States Constitution.

Moreover, if a rehearing is not granted, the decision will be forever tainted and its authority in doubt.

[Sections III-IX, which address the tort law issues in the case, have been omitted.]

CONCLUSION

The majority opinion issued on February 26 ought not to be the law of this state. If Minster's motion for rehearing is granted, it need not be. If the motion is denied, it is. And once it becomes the law of this state, the principal of stare decisis, which provides stability and predictability, and which ought not to be lightly ignored, applies. At that point, the February 26 decision and its effects will be very difficult to undo.

We can state no better than did Justice Holmes in his dissent the primary reason why Minster's motion for rehearing must be granted:

> "The majority opinion would render the manufacturer of any machinery absolutely liable for any and all injuries received by the user however careful the company may be in the design of the product and however careless the individual might be in the use thereof. This should not be the law."

Respectfully submitted,

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[CERTIFICATE OF SERVICE OMITTED.]

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No. 81-256

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ,
Plaintiff-Appellant,

v.

MINSTER MACHINE COMPANY,
Defendant-Appellee.

APPENDIX TO BRIEF IN SUPPORT OF MOTION FOR REHEARING

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[The January 15, 1982 press release of Chief Justice Celebrezze, which appeared as the first document in the Appendix to Brief in Support of Motion for Rehearing, has been reproduced below at App. 161.]

THE COLUMBUS DISPATCH

January 15, 1982

Celebrezze Joins Governor's Race

By Gene Jordan
Public Affairs Editor

Frank B. Celebrezze, 53, chief justice of the Ohio Supreme Court, announced Friday he will seek the Democratic gubernatorial nomination in the June 8 primary.

Celebrezze attacked the Rhodes administration for "lurching from crisis to crisis," in his announcement in the Statehouse Rotunda.

Celebrezze said he will resign from the court as soon as 53 pending decisions are released and that he won't make any political statements before he quits.

He hopes to resign by the last week in February in a move required by judicial canons and the Ohio Constitution when a judge seeks a non-judicial office.

Gov. James A. Rhodes will appoint Celebrezze's successor.

CELEBREZZE SAID he is running for governor because, "We are in a real leadership crisis in our state today."

The Rhodes administration is "spending more, delivering less and watching the quality of Ohio life declining," Celebrezze charged.

"For example, nearly 13 percent of our people, 643,000, are now out of work. Our situation demands straight talk and

unconventional action. We need to recapture Ohio's destiny," Celebrezze said.

Celebrezze, former Cuyahoga County Common Pleas Court judge, was appointed to the Supreme Court in 1972, was elected later that year, re-elected in 1974, elected chief justice in 1978 and re-elected in 1980.

Celebrezze becomes the third Democrat to announce his candidacy officially. Attorney General William J. Brown announced Monday and Dale R. Reusch, who said he's imperial wizard of the Ohio Ku Klux Klan, announced Thursday. Reusch received 15 percent of the vote for governor in the 1978 primary.

Other Democrats who expect to announce their candidacies soon are former Lt. Gov. Richard F. Celeste; Jerry Springer, a former Cincinnati city councilman; and either Ohio House Speaker Vernal G. Riffe Jr. or Marvin L. Warner, a Cincinnati businessman.

[An article from the March 7, 1982 Toledo *Blade*, entitled "Does Ohio Need Product-Liability Reform Law?" has been omitted.]

SUPREME COURT OF OHIO

JANUARY TERM, 1982.

LOMBARD, APPELLANT, *v.*
GOOD SAMARITAN MEDICAL CENTER, APPELLEE.
ZAK ET AL., APPELLANTS, *v.* ST. VINCENT HOSPITAL
& MEDICAL CENTER ET AL., APPELLEES.

[Cite as Lombard v. Medical Center (1982),
69 Ohio St. 2d 471.]

Negligence—Hospital employees—Limitation of actions—R. C. 2305.11(A) not applicable.

The one-year statute of limitations of R. C. 2305.11(A) does not apply to hospital employees (nurses and laboratory technicians) whose conduct does not fall within the common-law definition of "malpractice." (*Hocking Conservancy Dist.* v. *Dodson-Lindblom Assoc.*, 62 Ohio St. 2d 195, approved and followed.)

(Nos. 81-686 and 81-688—Decided February 26, 1982.)

CERTIFIED by the Court of Appeals for Muskingum and Lucas Counties.

In case No. 81-686, appellee Good Samaritan Medical Center ("Good Samaritan") admitted appellant Mary F. Lombard ("Lombard") as a patient on April 1, 1976. On April 19, 1976, she was injured in a fall from her hospital bed. She filed a complaint in the Court of Common Pleas of Muskingum County on April 4, 1978, and alleged that the negligence of employees at Good Samaritan was the proximate cause of her injuries. At trial, the Court of Common Pleas directed a verdict for Good Samaritan because Lombard failed to present a *prima facie* case and because R. C. 2305.11(A) bars malpractice actions filed more than one year after the cause of action accrued.

The Court of Appeals held that the statute of limitations barred Lombard's action but did not rule on the issue of whether Lombard established a *prima facie* case.

In case No. 81-688, a lab technician at appellee St. Vincent Hospital and Medical Center ("St. Vincent") removed blood

from appellant Adeline T. Zak ("Zak") on February 14, 1978. On February 5, 1979, St. Vincent received a notice from Zak and her husband that they intended to sue the hospital for damages. On August 7, 1979, they filed a complaint in the Court of Common Pleas of Lucas County, alleging that the technician's negligent act was the proximate cause of her paralysis. The trial court granted summary judgment in favor of St. Vincent because R. C. 2305.11 barred the action. The Court of Appeals affirmed.

The Courts of Appeals for Muskingum and Lucas Counties certified the records of these cases to this court for review and final determination for the reason that their judgments were in conflict with the determination of the Court of Appeals for Logan County in *Salyers* v. *Mary Rutan Hospital* (November 2, 1979), case No. 8-79-20, unreported.

Messrs. Volkema & Scherner and *Mr. Hans Scherner,* for appellant in case No. 81-686.

Messrs. Kincaid, Cultice, Micheli & Geyer, Mr. James C. Micheli and *Mr. Frank J. Micheli,* for appellee in case No. 81-686.

Mr. Joseph W. Westmeyer, Jr., for appellants in case No. 81-688.

Messrs. Shumaker, Loop & Kendrick, Mr. James M. Tuschman and *Mr. John C. Barron,* for appellees in case No. 81-688.

LOCHER, J. These cases present the same issue: whether the one-year statute of limitations in R. C. 2305.11(A) bars the appellants' actions.

R. C. 2305.11(A) provides, in pertinent part: "An action for * * * malpractice, including an action for malpractice against a physician, podiatrist, or a hospital * * * shall be brought within one year after the cause thereof accrued * * *."[1]

[1] Prior to amendments passed in 1975 and 1976, R. C. 2305.11 did not contain the language "including an action for malpractice against a physician, podiatrist, or a hospital." Otherwise, the limitation provision remained the same.

This provision has limited applicability. "The statute of limitations contained in R. C. 2305.11(A) is limited to the areas specifically enumerated therein and to the common-law definition of 'malpractice.' " *Hocking Conservancy Dist.* v. *Dodson-Lindblom Assoc.* (1980), 62 Ohio St. 2d 195.

Likewise, the term "malpractice" has a limited definition. "Today, the term, malpractice, is sometimes used loosely to refer to the negligence of a member of any professional group. However, legally and technically, it is still subject to the limited common-law definition. It is well established that where a statute uses a word which has a definite meaning at common law, it will be presumed to be used in that sense and not in the loose popular sense. *Grogan* v. *Garrison* [1875], 27 Ohio St. 50, 63.

"If the General Assembly had wished to protect groups other than those traditionally associated with malpractice, it should have listed the ones to be covered * * *.

"There is no compelling reason for a nurse to be given the protection of a one-year statute of limitations. A nurse, although obviously skilled and well trained, is not in the same category as a physician who is required to exercise his independent judgment on matters which may mean the difference between life and death * * *." *Richardson* v. *Doe* (1964), 176 Ohio St. 370, 372-373. Nor does the definition of malpractice encompass the conduct of laboratory technicians. Although they too are skilled and trained, the General Assembly has not singled them out for the special protection provided by the one-year statute of limitations in R. C. 2305.11(A).

Accordingly, neither of these cases presents an action in malpractice. Rather, appellants have alleged negligence against individuals whose occupations are not among those enumerated in R. C. 2305.11(A) or within the common-law definition of "malpractice." Therefore, R. C. 2305.11(A) may not bar an action against the hospitals who are their employers.

Appellees argue, however, that (1) these cases present "medical claims";[2] (2) the General Assembly intended that the terms "malpractice" and "medical claims" be used interchangeably; and, therefore, (3) R. C. 2305.11(A) bars all medical claims filed more than one year after the cause of action arose. We disagree.

R. C. 2305.11(B) provides, in pertinent part:

"In no event shall any *medical claim* against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged *malpractice* occurred * * *.[3] (Emphasis added.)

We admit that this sentence is confusing. Yet, the operative limitation provision of R. C. 2305.11(A) expressly mentions "malpractice" without including "medical claims." As discussed above, our holding in *Hocking Conservancy Dist., supra,* requires that we continue to apply the common-law definition of "malpractice" when construing this statute of limitations. We find nothing in the statute to suggest that the General Assembly accepted the invitation of Judge Matthias in *Richardson, supra,* at 373, to extend the applicability of R. C. 2305.11(A) to the groups of people and the kind of conduct involved in these cases.

Accordingly, as to case No. 81-686, we reverse the Court of Appeals and remand the cause for further proceedings consistent with this opinion and App. R. 12(A). As to case No. 81-688, we reverse the Court of Appeals and remand the cause for further proceedings consistent with this opinion.

Judgments reversed.

CELEBREZZE, C. J., W. Brown and C. BROWN, JJ., concur.

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[2] R. C. 2305.11(D)(3) provides:

" 'Medical claim' means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person."

The General Assembly added this provision in 1975 as part of Am. Sub. H. B. No. 682 (136 Ohio Laws 2809, 2811).

[3] The General Assembly added this provision in 1975 as part of Am. Sub. H. B. No. 682 (136 Ohio Laws 2809, 2811).

Dissenting Opinion, per HOLMES, J.

SWEENEY, HOLMES and KRUPANSKY, JJ., dissent.

HOLMES, J., dissenting. Since I fundamentally disagree with the majority's analysis of R. C. 2305.11, as amended by Am. Sub. H. B. No. 682, I dissent.

As a starting point of analysis, courts must look to the legislative intent of the statute. In *Vance* v. *St. Vincent Hospital* (1980), 64 Ohio St. 2d 36, 40, this court discussed the legislative purpose of Am. Sub. H. B. No. 682, and stated that it was:

"* * * legislation declared to be 'an emergency measure necessary for the immediate preservation of the public peace, health, and safety' due to 'the fact that immediate action is necessary to insure a continuance of health care delivery to the citizens of Ohio.' *Id.*, at Section 8. The legislation was comprehensive in nature and consisted of a response to what was largely perceived throughout the country to be a medical malpractice 'crisis' manifested by sharply increased medical malpractice insurance premiums, cancellation of policies, and physician work slowdowns or stoppages." (Footnotes omitted.) See, also, *Beatty* v. *Akron City Hospital* (1981), 67 Ohio St. 2d 483.

As a tool to advance this purpose, the General Assembly adopted the concept of "medical claim." "Medical claim" is defined by R. C. 2305.11(D)(3) as:

"[*a*]*ny* claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person." (Emphasis added.)

Each of the present cases involves a claim in a civil action against a hospital which arose out of "the diagnosis, care or treatment" of a person. Hence, each is a "medical claim."

The next question is: does the one-year limitation period contained in R. C. 2305.11(A) apply to all medical claims? Keeping in mind the legislative purpose of Am. Sub. H. B. No.

682, and that its provisions must be read *in pari materia* [*Denicola* v. *Providence Hospital* (1979), 57 Ohio St. 2d 115], I feel that this question must be answered affirmatively.

An examination of R. C. 2305.11 leads to the conclusion that the General Assembly used the words "malpractice" and "medical claim" interchangeably. The second paragraph of R.C. 2305.11(A) allows one to serve written notice, prior to expiration of the time in R. C. 2305.11(A), upon a person and extend the time in which a suit may be brought against that person by up to 180 days from the time notice is given. This paragraph does not refer at all to malpractice. Rather, it uses the phrase "medical claim." This is evidence that the General Assembly considered the words "malpractice" and "Medical Claim" to be synonymous, for if the legislative intent was to give these words different meanings, it would make little sense to include actions such as the present one in a subsection that did not apply to them.

Likewise, in subsection (B) of R. C. 2305.11, there is an absolute four-year limitation placed upon all medical claims. This four-year period runs from the date "the act or omission constituting the alleged malpractice occurred." Once again, the General Assembly has used the words interchangeably.

Finally, I feel the majority's reliance upon *Hocking Conservancy Dist.* v. *Dodson-Lindblom Assoc.* (1980), 62 Ohio St. 2d 195, is misplaced. The precise question before the court in *Hocking* was whether professional engineers should be included within the definition of malpractice in R. C. 2305.11(A). Consequently, would engineers be afforded the protection of the one-year statute of limitations? Here, the question is what claims asserted against a hospital, which is an area specifically enumerated in R. C. 2305.11(A), are within the coverage of that section.[4]

As I would hold that R. C. 2305.11(A) applies to all medical claims, the judgments of the Courts of Appeals should be affirmed.

SWEENEY and KRUPANSKY, JJ., concur in the foregoing dissenting opinion.

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[4] The hospitals were the defendants in these cases, not their employees.

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

ADELINE T. ZAK, *et al.*,

Plaintiffs,

-vs-

ST. VINCENT HOSPITAL AND MEDICAL CENTER, *et al.*,

Defendants.

Case No. 79-1737

MEMORANDUM DECISION AND JUDGMENT ENTRY

May 19, 1980

This cause is before the Court upon defendant St. Vincent Hospital and Medical Center's motion for summary judgment. The cause was submitted on the pleadings, the affidavits filed herein, the briefs of counsel and the oral arguments of counsel. In consideration of the same, the Court finds that the defendant's motion for summary judgment is well-taken and is hereby granted.

DISCUSSION

This is a medical malpractice action wherein the plaintiff Adeline T. Zak alleges that on February 14, 1978 a laboratory technician employed by defendant St. Vincent negligently removed blood from the plaintiff thereby proximately causing the paralysis of the plaintiff. Mrs. Zak's husband, Thaddeus J. Zak, also claims against the defendant for loss of consortium. Defendant St. Vincent has moved for summary judgment against plaintiff Adeline T. Zak and Thaddeus J. Zak on the grounds that all causes of action alleged in plaintiffs' complaint are barred as untimely by R.C. 2305.11.

Plaintiff Adeline T. Zak, in opposition to defendant's motion, contends that her action against St. Vincent Hospital is not governed by R.C. 2305.11, but rather by R.C. 2305.10 and

therefore is timely. Alternatively, Mrs. Zak argues that even if R.C. 2305.11 applies herein, her action was filed within the time limitations set forth in R.C. 2305.11(A). Plaintiff Thaddeus Zak opposes defendant's motion for summary judgment on the grounds that his action for loss of consortium is governed by the time limitations set forth R.C. 2305.09 and thus is timely.

A. Plaintiff Adeline T. Zak

Mrs. Zak argues that at common law an action against a hospital for the alleged negligence of its laboratory technician-employee did not constitute an action for medical malpractice. *See Richardson* v. *Doe,* 176 Ohio St. 370 (1954). Plaintiff furthermore contends that R.C. 2305 incorporates the common law definition of malpractice and that according her action is not governed by the time limitations set forth in R.C. 2305.11(A), but rather by the two-year statute of limitations under R.C. 2305.10. The defendant, on the other hand, maintains than when the Ohio legislature enacted *Am. Sub. H.B.* No. 682 (effective July 28, 1975) amending R.C. 2305.11, it supplanted the common law definition of malpractice with the more expansive concept of a "medical claim." *See* R.C. 2305.11(D)(3). Continuing, the defendant states that since Mrs. Zak's claim is clearly a "medical claim" under R.C. 2305.11(D)(3), her action is governed by the time limitations set forth in R.C. 2305.11(A).

R.C. 2305.11(D)(3), provides that:

> "Medical claim means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person."

There is no dispute that Mrs. Zak's claim is a "medical claim" as that term is defined in R.C. 2305.11(D)(3). The controversy is whether a medical claim against a hospital, constitutes an action for malpractice under R.C. 2305.11(A) where the hospital's liability is premised upon the doctrine of *respondeat superior* for the alleged negligence of a laboratory technician-employee.

At the outset, the Court finds that R.C. 2305.11 does not clearly delineate the distinction, if any, between an action for medical malpractice and a medical claim. The first paragraph of subdivision (A) R.C. 2305.11, speaks of an action for malpractice against a hospital without mentioning the term "medical claim":

> "An action . . . for malpractice against a physician, podiatrist, or a hospital, . . . , shall be brought within one year after the cause thereof accrued, . . ."

The second paragraph of subdivision (A) provides that:

> If a written notice, prior to the expiration of time contained in this division, is *given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual,* then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given." (emphasis added).

This paragraph is somewhat confusing in that it apparently limits medical malpractice actions to medical claims against "persons" who perform professional services. The first paragraph of subdivision (A), R.C. 2305. however, contradicts the plain language of the second paragraph by expressly referring to an action for malpractice against a hospital. In light of the foregoing, the Court finds that R.C. 2305.11(A) is ambiguous as to what constitutes hospital malpractice and accordingly it is incumbent upon the court to construe R.C. 2305.11 in accordance with the legislature's intent. *See generally* 73 Am. Jur. 2d, Statutes, §194.

It is axiomatic that the individual sections and subdivisions of a statute are in *pari materia* and thus must be construed together. *See* 50 O.Jur.2d, Statutes, §218. To this end they should "be reconciled, harmonized, and made to apply and given meaning and effect, so as to render their contents operative and valid, . . ." *Id.*, §216. Reading paragraphs one and two of subdivision (A), R.C. 2305.11, in *pari materia,* it is

the Court's opinion that an action against a hospital relating to professional services provided by the hospital constitutes an action for malpractice within the meaning and intent of R.C. 2305.11(A).

The question then, is whether the defendant hospital was providing a "professional service" to the plaintiff. The term "professional service" is not defined in R.C. 2305.11; and therefore, its meaning must be ascertained in light of the established principles of statutory construction. In this regard, the Court finds significant the provisions of R.C. 1.11:

> "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting a personal liberty, relating to amercement or of a penal nature."

R.C. 2305.11, insofar as it pertains to physicians, podiatrists and hospitals, is clearly a remedial statute. *See generally,* S. R. Ripps, *The Ohio Medical Malpractice Statute: An Analysis,* 4 Ohio N.L. Rev. 24 (1977). Accordingly, it is the Court's opinion that the term "professional services", with respect to a hospital, must be interpreted liberally and includes the removal of a person's blood, for purposes of testing, by a laboratory technician employed by the hospital.

The Court recognizes that the foregoing conclusion is contrary to the decision in *Salyers* v. *Mary Rutan Hospital,* No. 8-79-20 (Ct. App. Logan County, Ohio, Nov. 2, 1979). The Court, however, is not persuaded as was the court in *Salyers, supra,* that the legislature, in enacting the 1975 amendments to R.C. 2305.11, intended to retain the common-law definition of malpractice. *Salyers, supra* at p. 10. That the legislature intentionally and knowingly expanded the concept of medical malpractice is evident from the legislature's amendment of paragraph one of subdivision (A), R.C. 2305.11 to include malpractice actions against hospitals. In addition, the juxtapo-

sition of the terms "medical claim" and "malpractice" in R.C. 2305.11(B) indicates that the legislature intended to enlarge the common law definition of medical malpractice. Furthermore, the reasoning of the *Salyer* court is inconsistent with the Lucas County Court of Appeal's interpretation of R.C. 2305.11. In a recent opinion, the Lucas County Court of Appeals held that a claim for loss of consortium arising in connection with a medical malpractice action is a "medical claim" (R.C. 2305.11(D)(3)) and furthermore, that "medical claims" are subject to the time limitations set forth in R.C. 2305.11(A). *Vance* v. *St. Vincent Hospital,* No. L-78-292 (Ct. App. Lucas Cty., Oct. 26, 1979) (*cert. granted* Ohio Sup. Ct., Jan. 2, 1980). As the court explained:

> "With the amendment of R.C. 2305.11 in 1975, however an action for loss of services in connection with a medical malpractice action is governed by the one-year limitation set forth in that section. This is so because a 'medical claim' to which the one-year statute is applicable is defined in paragraph (D)(3) of the section to mean, '* * * *any claim* asserted in *any* civil action against a physician, podiatrist, or hospital, arising out of the diagnosis, care, or treatment of *any* person.' (emphasis added)
>
> Clearly, the claim of Doris Vance, the mother of Marcella, for medical expenses and loss of services is a claim asserted in a civil action against a physician and hospital arising out of the care and treatment of a person. Accordingly, it is a medical claim within the meaning of the section and is subject to the one-year limitations set forth above. Therefore, just as the claims of Marcella Vance must fail as a matter of law because of untimely filing, so must the claim of Doris Vance." *Id.* at p. 24.

In view of the foregoing discussion and analysis, the Court finds that plaintiff Adeline T. Zak's claim against defendant St. Vincent Hospital constitutes an action for malpractice and accordingly is governed by the time limitations set forth in R.C. 2305.11(A).

B. Plaintiff Thaddeus J. Zak.

Plaintiff Thaddeus J. Zak contends that his action against defendant St. Vincent Hospital for loss of consortium, loss of services and medical expenses, arising from the alleged medical malpractice upon his wife, is governed by the four-year time limitation set forth in R.C. 2305.09(D). A similar argument was rejected recently by the Lucas County Court of Appeals in *Vance* v. *St. Vincent Hospital,* No. L-78-292 (Ct. App. Lucas Cty., Oct. 26, 1979) (cert. granted Ohio Supreme Ct., Jan. 2, 1980) where the court held that an action for loss of consortium loss of services and medical expenses arising in connection with a medical malpractice action is governed by the time limitations set forth in R.C. 2305.11(A). Accordingly, the Court finds that as to plaintiff Thaddeus J. Zak's cause of action against defendant St. Vincent Hospital, R.C. 2305.11(A) provides the applicable statute of limitation.

C. Application of R.C. 2305.11(A) to the case *sub judice*

The record before the Court establishes that on February 11, 1978 plaintiff Adeline T. Zak was admitted to St. Vincent Hospital and that she was discharged from St. Vincent on March 1, 1978. On February 5, 1979 defendant St. Vincent Hospital received notice from the plaintiffs that they were contemplating bringing an action against St. Vincent as a result of the allegedly negligent removal of Mrs. Zak's blood. By so notifying St. Vincent Hospital, the plaintiffs invoked the 180-day extension provision under R.C. 2305.11(A) for commencing a medical malpractice action. On August 7, 1979, plaintiffs filed their complaint against St. Vincent Hospital and Mary Doe, an unknown and unnamed defendant employed by St. Vincent who allegedly performed the removal of plaintiff Adeline Zak's blood.

R.C. 2305.11(A) sets forth the applicable statute of limitations governing medical malpractice actions. In relevant part, R.C. 2305.11(A) provides that:

> "An action . . . for malpractice against a hospital, . . ., shall be brought within one year after the cause thereof accrued, * * *"

R.C. 2305.11(A) further provides that:

> "If written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then *an action by that individual against that person may be commenced within one hundred eighty days after that notice is given.* (emphasis added).

In the case at bar, it is clear that the plaintiffs' R.C. 2305.11 notice to the defendant was given within one year after Adeline Zak's cause of action accrued. Plaintiffs further aver that this notice was mailed to defendant St. Vincent Hospital on February 2, 1979. The defendant has submitted the affidavit of Helen Frass, an employee of St. Vincent Hospital, wherein she states that the aforementioned notice was received by St. Vincent Hospital on February 5, 1979. Plaintiffs have not submitted any evidentiary materials, as required by Civ. R. 56(E), showing that there is a genuine issue of material fact as to when St. Vincent Hospital received plaintiffs' R.C. 2305.11(A) notice. Thus, the Court finds that reasonable minds could only conclude that plaintiffs' notice was received by St. Vincent Hospital on February 5, 1979.

Under R.C. 2305.11(A), plaintiffs had 180 days from February 5, 1979 in which to commence their actions against St. Vincent Hospital. Thus, by force of R.C. 1.14, the time limitation for bringing their actions expired on August 6, 1979, one day prior to the filing of this lawsuit.

It would appear then that plaintiffs claims against St. Vincent Hospital are untimely and therefore barred by R.C. 2305.11(A). Plaintiffs however, contend that their actions are not barred because Mrs. Zak's discharge from the hospital on March 1, 1978 did not terminate the hospital-patient relationship between the parties and that therefore her cause of action did not accrue until sometime (plaintiff does not specify precisely when) after March 1, 1978. While the Court agrees

that Mrs. Zak's cause of action against the hospital did not arise until termination of the Hospital-patient relationship, *Wyler* v. *Tripi,* 25 Ohio St. 2d 164 (1971), and that her discharge from the hospital did not necessarily terminate the relationship between the parties, the Court finds that Mrs. Zak's claim against defendant St. Vincent Hospital is barred under R.C. 2305.11(A).

The gist of plaintiff's argument is that for purposes of determining the time limitations for bringing a medical malpractice action where the defendant has received the written notice specified in R.C. 2305.11(A) the critical point is the date when the cause of action accrued, not the date when the notice "is given." Plaintiff's interpretation, however does not comport with the plain meaning of the language employed in R.C. 2305.11(A), to wit:

> " . . . an action . . . may be commenced at any time *within one hundred eighty days after notice is given.*" (emphasis added).

It is the Court's opinion that plaintiffs had 180 days from the date notice was given to defendant St. Vincent Hospital in which to commence their actions notwithstanding that Mrs. Zak's cause of action may have accrued after March 1, 1980. There is nothing in R.C. 2305.11(A) which suggests that upon giving the written notice specified therein, the 180 day period is to be computed from the date when the cause of action accrued. Since neither Mrs. Zak's nor Mr. Zak's actions against defendant St. Vincent Hospital were commenced within 180 days from said defendant's receipt of the written notice specified in R.C. 2305.11(A), the Court finds that their cause of actions are barred as untimely.

In light of the foregoing, it is the Court's opinion that there is no genuine issue of material fact; rather it is clear from the evidentiary materials properly before the Court under Civ. R. 56(C) that plaintiff Adeline T. Zak's and plaintiff Thaddeus J. Zak's complaints were not filed within the time limitations set

forth in R.C. 2305.11(A) and are therefore barred as untimely. Thus, under the law of Ohio, defendant St. Vincent Hospital's motion for summary judgment is well taken and is hereby granted.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that defendant St. Vincent Hospital's motion for summary judgment be granted and that judgment be, and hereby is, entered in the defendant's favor. It is furthermore ORDERED that all claims filed by the plaintiffs herein be dismissed with prejudice at plaintiffs' costs.

May 19, 1980 ROBERT V. FRANKLIN

V. 78
39-42

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

ADELINE T. ZAK, *et al.*,

Plaintiffs-Appellants

v.

ST. VINCENT HOSPITAL AND MEDICAL CENTER, *et al.*,

Defendants-Appellees

C.A. No. L-80-182
C.P. No. CV-79-1737

OPINION

Decided: March 6, 1981
Filed: March 6, 1981

HEADNOTE

Any claim against a hospital arising from any medical diagnosis, care or treatment of any patient is a medical claim as defined in R.C. 2305.11(D)(3). The term "medical claim" is not limited to medical diagnosis, care or treatment provided by a physician, but includes any medical diagnosis, care or treatment provided by any hospital employee, including, as in this case, a lab technician.

* * *

Mr. Wilbur C. Jacobs, Counsel for Appellants.
Mr. John C. Barron, Counsel for Appellees.

* * *

DOUGLAS, J. Plaintiffs-appellants, and Thaddeus Zak, appeal from a decision of the Lucas County Common Pleas Court granting a summary judgment in favor of defendant-appellee St. Vincent Hospital.

On February 11, 1978, plaintiff-appellant Adeline Zak was admitted to St. Vincent Hospital. On February 14th one of the hospital's lab technicians removed some blood from her arm. Plaintiff-appellant was discharged from St. Vincent Hospital on March 1, 1978.

On February 5, 1979, defendant-appellee received a notice from Adeline Zak and her husband Thaddeus indicating they were going to file a lawsuit against the hospital.

On August 7, 1979, plaintiffs-appellants initiated this lawsuit in the Lucas County Court of Common Pleas. They alleged that the St. Vincent lab technician who had drawn Mrs. Zak's blood had negligently allowed some of it to flow into her tissues, causing a paralysis.

On January 16, 1980, St. Vincent Hospital moved the court for summary judgment, urging that plaintiffs-appellants' claims were barred by the statute of limitations, R.C. 2305.11. On May 19, 1980, the trial court granted the hospital's motion for summary judgment and ordered all of the plaintiffs-appellants' claims dismissed with prejudice. The Zaks then appealed the case to this court.

The plaintiffs-appellants' sole assignment of error is:

> "The trial court erred in rendering summary judgment for defendants."

The trial court granted summary judgment on the basis that R.C. 2305.11 was the germane statute of limitations and that the filing period contained in that statute had run out by the time the complaint was filed.

R.C. 2305.11, effective July 1, 1976, is concerned with time limitations for bringing certain actions. It states, in relevant part:

> "(A) an action for libel, slander, assault, battery, malicious prosecution, false imprisonment, *or malpractice, including an action for malpractice against a physician,* podiatrist or a *hospital* * * * shall be brought within one year after the cause thereof accrued. * * *" (Emphasis added).

"If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after notice is given. * * *"

"(D)(3) 'Medical claim' means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person."

In the case before us, the St. Vincent lab technician drew Mrs. Zak's blood on February 14, 1978. She was released from the hospital on March 1, 1978. The statute of limitations began to run on that date. On February 5, 1979, St. Vincent received notice of an impending lawsuit. The Zaks had 180 days from the date the notice was received to initiate their case. That 180-day period expired before August 7, 1979, the day this lawsuit was actually filed in the trial court.

The Zaks' argument is that R.C. 2305.11 is not the relevant statute of limitations. Mrs. Zak says R.C. 2305.10 was the statute applicable to her claim and Mr. Zak says 2305.09 is the statute relevant to his claim. One is a two-year statute and the other is a four-year statute of limitations.

The plaintiffs-appellants urge that R.C. 2305.11(A) is applicable to lawsuits against hospitals only when the claim against the hospital involves the alleged malpractice of one of its physicians.

We disagree with this analysis and hold that any claim against a hospital arising from any medical diagnosis, care or treatment of any patient is a medical claim as defined in R.C. 2305.11(D)(3). The term "medical claim" is not limited to medical diagnosis, care or treatment provided by a physician, but includes any medical diagnosis, care or treatment provided by any hospital employee, including, as in this case, a lab technician.

R.C. 2305.11(A) was the applicable statute of limitations in this case and the trial court committed no error in applying it.

For the foregoing reasons the judgment of the Lucas County Common Pleas Court is affirmed in all respects. This case is remanded to said court for execution for costs. Costs assessed against plaintiffs-appellants.

JUDGMENT AFFIRMED

Connors, P.J., and Potter, J., concur.

IN THE COURT OF APPEALS OF LUCAS COUNTY

ADELINE T. ZAK, *et al.*,
Appellants

VS.

ST. VINCENT HOSPITAL & MEDICAL CENTER, *et. al.*,
Appellees

Court of Appeals No. L-80-18
Trial Court No. CV-79-1737

Decision and Journal Entry

Date March 6, 1981

Finding the sole assignment of error not well taken, judgment of the Lucas County Common Pleas Court is affirmed at appellants' costs and cause is remanded to said court for execution for costs. See Opinion by Douglas, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

JOHN J. CONNORS, JR., P.J. _____
Presiding Judge

JOHN W. POTTER and _____
Judge

ANDY DOUGLAS, JJ., _____
concur. Judge

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

1982 TERM

ADELINE T. ZAK *et al.*,
Appellants,

To wit: March 9, 1982

vs.

ST. VINCENT HOSPITAL & MEDICAL CENTER *et al.*,
Appelles.

No. 81-688

REHEARING

It is ordered by the court that rehearing in this case is denied.

Filed
Court of Appeals
March 10, 1982
Lucas County, Ohio

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. Page .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 9th day of March, 1982.

THOMAS L. STARTZMAN, *Clerk.*

By SAM F. ADKINS, *Deputy.*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

ADELINE T. ZAK *et al.*,
Appellants,

vs.

ST. VINCENT HOSPITAL & MEDICAL CENTER *et al.*,
Appellees.

1982 Term

To wit: February 26, 1982

No. 81-688

MANDATE

To the Honorable Common Pleas Court, Within and for the County of Lucas, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and cause remanded to the Common Pleas Court for further proceedings consistent with, and for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN.
Clerk

..... 19.....

.....

.....Deputy

RECORD OF COSTS

Docket Fee.....	$25.00	Paid By Joseph W. Westmeyer, Jr.
Docket Fee.....	$	Paid By
Docket Fee.....	$	Paid By
Printing Record	$	Paid By
Supplemental Record.....	$	Paid By
Sheriff's Costs.....	$	Paid By
Sheriff's Costs.....	$	Paid By

No. 81-688

IN THE SUPREME COURT OF OHIO

ADELINE T. ZAK, *et al.*,

Plaintiffs-Appellants

vs.

ST. VINCENT HOSPITAL AND MEDICAL CENTER, *et al.*,

Defendants-Appellees.

MOTION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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Attorneys for Defendants-Appellees

No. 81-688

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO

ADELINE T. ZAK, *et al.*,
Plaintiffs-Appellants
vs.
ST. VINCENT HOSPITAL AND MEDICAL CENTER,
et al.,
Defendants-Appellees.

MOTION FOR REHEARING

Pursuant to the provisions of Supreme Court Rule 9, Section 1, appellees hereby move this Court for a rehearing.

There are four principal reasons why appellees' motion for rehearing must be granted:

1. The vote of the Chief Justice with the four-justice majority was null and void;

2. Because the vote of the Chief Justice was null and void, failure to grant the motion will itself be violative of appellees' constitutional rights;

3. The majority opinion results in an incomprehensible construction of R. C. 2305.11;

4. Appellants' failure to commence their action within 180 days after appellees received a written notice of appellants' intent to sue, barred this action, regardless of the otherwise applicable statute of limitations.

All of the foregoing constitute crucial issues which this Court should consider through a rehearing of this appeal.

Respectfully submitted,

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Attorneys for Defendants-Appellees

[*Certificate of Service Omitted*]

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No. 81-688

IN THE SUPREME COURT OF OHIO

ADELINE T. ZAK, *et al.*,

Plaintiffs-Appellants

vs.

ST. VINCENT HOSPITAL AND MEDICAL CENTER, *et al.*,

Defendant-Appellees.

MOTION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

[THE TABLE OF AUTHORITIES, INTRODUCTION, AND STATEMENT OF THE CASE HAVE BEEN OMITTED.]

III. AT THE TIME OF HIS ANNOUNCEMENT ON JANUARY 15, 1982 THAT HE WILL "BE A CANDIDATE FOR GOVERNOR," THE CHIEF JUSTICE BECAME DISQUALIFIED FROM SERVING IN THAT CAPACITY AND HIS VOTE WITH THE MAJORITY IN THE INSTANT CASE IS VOID.

On January 15, 1982, the Chief Justice announced that he "will be a candidate for governor." (See 1/15/82 press release and 1/15/82 *Columbus Dispatch* article attached hereto as Appendix A and Appendix B, respectively.) At that time, he became a candidate in a party primary for a non-judicial office.

Canon 7A(3) of the Code of Judicial Conduct provides that: "A judge *should* resign his office when he becomes a candidate either in a party primary or in a general election for a

non-judicial office, ..." (Emphasis added). The preface to the Code states that: "The canons and text establish mandatory standards unless otherwise indicated."

A "candidate" has been construed to mean "one who seeks the nomination of his political party at a primary election . . . ." *State ex rel Ranney* v. *Corey, et al.*, 47 N.E.2d 799 (Ct. App., Summit Cty. 1940). *See also: State ex rel Mazaris* v. *Gaylord*, 104 Ohio App. 419 (1957).

The most recent formal opinion from the American Bar Association discussing when a judge should resign for reasons of political candidacy is Formal Opinion 312, August 9, 1964. While construing the Canons of Judicial Ethics, which have since been replaced by the Code of Judicial Conduct, we are unaware of any intent on the part of the Ohio Supreme Court, in adopting the Code to lower the standards applicable to the judiciary.

Thus, in answer to the question "What do *Canon 28* and the opinions prohibit a judge from doing?" Formal Opinion 313 answered, in pertinent part:

> "13. He should not, while holding his judicial position, became an active candidate for either party at a primary or general election for an office other than a judicial office. This applies to all judges whether appointed or nominated and elected in a partisan or nonpartisan manner, and extends during the entire tenure as judge.
>
> 14. *If he decides to become such a candidate, he should resign.* This applies to all judges whether appointed or nominated and elected in a partisan or nonpartisan manner, and extends during the entire tenure as a judge."

The Chief Justice, in a speech delivered in the Statehouse rotunda on January 15, 1982, announced that he "will be a candidate for governor;" that "I shall then become an *active candidate* for governor"; that "this has been the most difficult and easiest *decision* of my life, but I feel this *decision* is right;"

and that he was "confident that my *candidacy* is best for Ohio." (Emphasis added).

The foregoing statements conclusively establish that, on January 15, 1982, the Chief Justice had decided to become an active candidate.

Ohio case law has established that the duty to resign is mandatory and not discretionary with the individual judge. The distinction between mandatory standards and permissible guidelines was discussed by Judge Day, writing for an unanimous Cuyahoga County Court of Appeals, in *Cuyahoga County Board of Mental Retardation* v. *Association of Cuyahoga County Teachers of the Trainable Retarded, et al.*, 47 Ohio App. 2d 28, 33 (1975) [hereinafter referred to as "*Retardation*"]:

> "In examining the Code of Judicial Conduct it is apparent that while the permissible guidelines are indicated by the use of the word 'may', the mandatory portions are set forth by the word 'should'. This is entirely consistent with the plain meaning of a word which expresses an obligation or duty." [Citations omitted].

Thus, it was mandatory, and not discretionary, that the Chief Justice resign on January 15, 1982.

The reasons for this policy were explained by a unanimous court in *Mahoning County Bar Association* v. *Franks*, 168 Ohio St. 17, 26-27 (1958):

> "The purpose of such restrictions is to keep judges ever mindful that, even though they may have been nominated in a partisan primary and may have been connected to some extent with partisan politics during their compaign for election (though elected on a nonpartisan ballot), once elected to the judiciary they have assumed an office of public trust which must remain outside and distinct from the 'mainstream' of partisan politics in order to maintain the independence, impartiality and freedom from bias, prejudice and pressure, which the people have a right to expect from their judges.

> "It is thus apparent that the requirements of Canon 30 that a judge who becomes a candidate for a nonjudicial office shall resign his judicial position and that a judge who is a candidate for a judicial office must exercise caution in engaging in partisan activities are not merely arbitrary rules of conduct laid down by this court, but are requirements bottomed on the premise that the judiciary of the state of Ohio shall be kept as far as possible from the 'mainstream' of partisan politics, all things considered, and that the resignation of a judge who becomes a candidate for a nonjudicial office is a reasonable measure designed to preclude the possibility of the intrusion of partisan politics into the administration of justice and to preclude even the suspicion of such intrusion, which would normally attach to every ruling a judge who retains the bench while a candidate for a nonjudicial office might make, *regardless of his intent or the soundness or justice of such ruling.*" (Emphasis added).

What then was the effect of the Chief Justice's failure to resign on January 15? Given the fact that "Rule IV of the Supreme Court Rules for the government of the Bar of Ohio provides that the Canons of Judicial Ethics are 'binding' upon all judicial officers of the state," (*Retardation,* 47 Ohio App. 2d, at 33), that "[t]he oath of office of a judge * * * provides that a judge will 'discharge and perform all the duties incumbent on him as such judge * * *'," (*Retardation,* 47 Ohio App. 2d, at 31), and that "[o]ne of those duties is to conform his conduct to that set forth in the Code of Judicial Conduct," (*Retardation,* 47 Ohio App. 2d, at 31), the Chief Justice was "under a compulsory duty" (*Retardation,* 47 Ohio App. 2d at 33) to resign and his "attempt * * * to exercise his authority as a judge in violation of his clear mandatory duty is of absolutely no effect. See *In re Dellenbaugh & Burke* (1899), 17 Cir. Ct. R. 106, *aff'd sub nom In re Frank Dellenbaugh, ex parte* (1900), 62 Ohio St. 658; *United States* v. *America* (6th Cir. 1969), 411 F.2d 1130." *Retardation,* 47 Ohio App. 2d, at 33.

The appellate court in *Retardation* explained at 33-34:

> "We are not persuaded that these 'mandatory' and 'binding' standards were intended to be empty admonitions which a trial judge could openly disregard, subject only to retrospective disciplinary action against himself, with no effect upon the improper actions which the canons were designed to protect against. Rather, we find that the design and purpose of the Code was to impose a standard of conduct upon judges to which they must conform. The duty of a trial judge under Section 3(C)(1)(d)(i) of the Code of Judicial Conduct, similar to that provided under 28 U.S.C. Section 455 (1975 Supp.) controlling the disqualification of federal judges, is one placed solely upon the individual judge. And like the attempt of a judge to exercise judicial power when prohibited by state or federal statutes, we find that such an attempt as exemplified herein was void. See *In re Dellenbaugh & Burke, supra; United States* v. *Amerine, supra.*
>
> "* * *
>
> "For these reasons, we hold that the trial judge in the instant case had a mandatory duty from the beginning of the proceedings to disqualify himself from this case, and that his each and every subsequent act, being in violation of his clear and mandatory duty, was utterly void and without effect."

This Court has also recognized that a judge is "without power to hear and determine a cause after disqualification." *Beer* v. *Griffith*, 54 Ohio St. 2d 440, 442 (1978). In that case, however, the majority found that the trial judge's acts were not void because he had not been disqualified in accordance with the specific procedure set forth in Section 5(C) of Article IV of the Ohio Constitution vesting the Chief Justice with the authority and duty to "pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof." Thus, the court held, where there is a specific procedure for determining disqualification, the judge's acts prior to

the determination of disqualification by the Chief Justice are not void, but merely voidable.

That, however, is not this case. Here, there is no procedure for determining when a supreme court justice is disqualified.[2] Here, there is merely a constitutional procedure for appointing another justice to sit when "any member of the court shall be unable, by reason of illness, disability *or disqualification,* to hear, consider and decide a cause . . . ." Ohio Const., Art. IV, §2 (emphasis added).

By what method is disqualification of a supreme court justice then determined? The disqualifying act itself, when it is a clear and undisputable failure to perform a mandatory duty imposed by a canon of the Code of Judicial Conduct, is self-executing. Disqualification results from performance of the disqualifying act.

This must be so, for, in this instance, "the duty of a * * * judge is one placed solely on the individual judge. And like the attempt of a judge to exercise judicial power when prohibited by state or federal statutes, * * * such an attempt as exemplified herein was void." *Retardation,* 47 Ohio App. 2d at 34.

If this is not the case, a justice of the Supreme Court could simply refuse to disqualify himself in any case, no matter what the reason for which he should be disqualified. Even where the grounds for disqualification were based upon consanguinity, bias, or prejudice (which is not the case here), there would be no procedure pursuant to which a party could even seek the disqualification of the justice. While the justice who should have disqualified himself might be subject "to retrospective disciplinary action against himself." *Retardation,* 47 Ohio App. 2d at 34, this would have "no effect upon the improper actions which the canons were designed to protect against". *Retardation,* 47 Ohio App. 2d at 34.

This cannot be the law of Ohio. Rather, a clearly disqualifying act must itself result in disqualification.

---

[2] While R.C. 2701.03 and R.C. 2501.13 provide procedures for determining the disqualification of common pleas and appellate court judges, there is no analogous statute applicable to supreme court justices.

Moreover, it can be no answer that the case had been voted on prior to January 15, 1982, since, having become disqualified on that date, on the date of disposition, February 26, 1982, the Chief Justice was disqualified from participation in the Court's decision. *State* v. *Pembour,* 69 Ohio St. 2d 110 (1982).

Thus, having become disqualified on January 15, the Chief Justice's vote with the majority in the instant case is void. Thus, the Court was equally divided and either:

1. the judgment of the court of appeals was therefore affirmed; or

2. the motion for rehearing must be granted and the case must be reargued.

Should this Court refuse either of the above alternatives, the result is violative of Article IV, §2(A) of the Ohio Constitution in that the case was decided by a panel which included a disqualified judge and a judgment was rendered by less than a majority of the Court.

Moreover, refusal to grant the relief requested would also be violative of the Fourteenth Amendment of the United States Constitution in that appellees have been deprived of their right to due process of law by being subjected to the enforcement of a void judgment.

We hasten to point out that it is not appellees' position that all acts of this Court since January 15, 1982 are null and void. Rather, only those in which the acts of the Chief Justice were determinative, such as the instant case where the decision was rendered by a four to three margin in which the Chief Justice was in the majority.

This entire issue would, of course, be moot if appellees' motion for rehearing is granted and the case is heard by a panel of justices duly "qualified" within the meaning of Article IV, § 2(A) of the Ohio Constitution.

IV. FAILURE TO GRANT APPELLEES' MOTION FOR REHEARING WILL ITSELF RESULT IN VIOLATIONS OF APPELLEES' OHIO AND UNITED STATES CONSTITUTIONAL RIGHTS.

While it would seem clear from the foregoing that the Chief Justice's vote in this matter is null and void, at the very least, under the circumstances of his disqualification, it was voidable. This, at the minimum, was the Court's holding in *Beer v. Griffith,* 54 Ohio St. 2d 440, 442 (1978).

Assuming, *arguendo,* that the judgment is merely voidable, it became so for the first time in this Court, which is ordinarily a court of last resort. Under such circumstances, where a judgment becomes voidable as a result of an element injected into the case for the first time in the Court of last resort, the party aggrieved has a constitutional right to rehearing.

As this Court has stated:

> "A reading of Article IV of the Constitution of Ohio is convincing that it is the spirit of our fundamental law that a litigant shall be entitled not only to a fair and impartial trial but shall have at least one review if he so desires." *State v. Nickles,* 159 Ohio St. 353, 357 (1953).

Since the judgment herein first became void or voidable in this Court, appellees have a right to "at least one review." Procedurally, that review can be obtained only through the mechanism of a rehearing.

Thus, failure to grant appellees' motion for rehearing will result in violations of their rights under the Fourth Amendment of the Ohio Constitution, as well as its due process rights under the Fourteenth Amendment of the United States Constitution.

V. THE MAJORITY OPINION IGNORES THE INTENT AND PURPOSE OF THE 1975 AMENDMENTS TO R. C. 2305.11 AND MAKES THE ENTIRE STATUTE INCOMPREHENSIBLE.

Without any analysis, the majority opinion hastily reached the conclusion that the term "malpractice" in R. C. 2305.11(A)

retained its common law meaning. It did so without first considering the extensive revisions the General Assembly made in that statute as part of the Medical Malpractice Act of 1975. Based on this conclusion, the majority determined that pre-1975 case law controlled and that hospitals were subject to the same statutes of limitations as their non-physician employees.

Appellants' failure to commence their action within 180 days of appellee's receipt of this written notice barred the action. This result is mandated by the unambiguous language in the second paragraph of R. C. 2305.11(A).

The second paragraph of R. C. 2305.11(A) specifically states that it applies to "medical claims." It is conceded, as it must be in light of the broad definition of medical claim in R. C. 2305.11(D)(3), that this action involves a medical claim. Therefore, regardless of the otherwise applicable statute of limitations, a medical claim is barred if not brought within 180 days of receipt of the written notice.

IX. CONCLUSION.

Unless the terms "malpractice" and "medical claims" are interpreted as being synonymous in R. C. 2305.11, most of the statute makes absolutely no sense. The use of these terms interchangeably in the statute and the General Assembly's declared intent in amending R. C. 2305.11 make it evident that these terms are, indeed, synonymous.

The majority's conclusion that the General Assembly did not intend to alter the common law definition of medical malpractice is erroneous, and its reliance on *Hocking Conservatory Dist. v. Dodson-Lindblom Assoc., supra,* is misplaced. The Court's language in *Hocking* acknowledged that the General Assembly had extended the common law definition of malpractice in the "health care and medical care areas." *Id.* at 198.

It is incumbent upon a court when called upon to interpret the meaning of a statute to construe the statute in such a way

that it effectuates the legislative intent, and in such a way that the statute is comprehensible. The majority failed to do so in *Lombard.* The result is an incorrect decision which will spawn litigation, confusion, and total nullification of the legislative purpose in amending R. C. 2305.11 to include hospitals.

Appellees assert that the instant motion for rehearing should be granted so as to provide this Court with an opportunity to reconsider the statutory nullification worked by the majority opinion in *Lombard.* However, even if the Court should reject appellees' argument of the merits, it must grant a rehearing to consider the constitutional errors involved in Chief Justice Celebrezee's vote in *Lombard,* as described in Sections III. and IV. of this brief.

For these reasons, the Court should grant the instant motion for rehearing.

Respectfully submitted,

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Toledo, Ohio 43624
(419) 241-4201

Attorneys for Defendants-Appelles

[Certificate of Service is Omitted.]

[Appendix A to the Motion for Rehearing and Brief in Support is a copy of the January 15, 1982 press release of Chief Justice Celebrezze, and is reproduced below at App. 161. Appendix B, an article from the January 15, 1982 Columbus *Dispatch* entitled "Celebrezze Joins Governor's Race" is reproduced above at App. 121.]

The Supreme Court of Ohio [*]

Columbus

Chambers of
Chief Justice Frank D. Celebrezze

for release: 9AM Fri.
15 Jan 82

COLUMBUS—At the outset, I want to thank all of you for your presence here today. It indicates two vital things to me. First, that you are interested in Frank Celebrezze's plans and secondly, more importantly, that you are interested in the future of Ohio.

The purpose of this statement is to acknowledge my awareness of public speculation concerning my becoming a candidate for Governor of Ohio in the forthcoming Democratic Primary. I will be a candidate for governor.

Let me assure you that my commitment and my duty to the Court and the Law is clear.

My colleagues on the Supreme Court and I are currently in the process of preparing opinions on 53 outstanding cases already heard and submitted. I intend to cooperate fully with my colleagues in the disposition of these 53 cases and to refrain from participating in or hearing any new cases beginning today before the Court. I plan to resign from the Court immediately following release of these 53 pending decisions—with a personal deadline of the week of February 22—doing everything I can to expedite that process.

Having strictly and fully observed my obligations to the Court and Ohio law, I shall then become an active candidate for Governor.

In many ways this has been both the most difficult and the easiest decision of my life, but I feel this decision is right. One

[* A copy of this press release was attached as an appendix to the briefs in support of the motions for rehearing in *Cincinnati Milacron, Minster Machine* and *St. Vincent Hospital.* (See App. 65, 121, 160.)]

of the reasons is the support of my wife, Mary Ann. We have talked and prayed over it for months. It is no secret that the Democratic Primary ballot will be crowded. There is no sure thing in politics, and this year that cliche is especially true.

Also, the position of Chief Justice has been a particularly satisfying one, permitting me to accomplish significant achievements both legally and administratively as a member of the Supreme Court these past ten years. Some may question my decision to resign the highest judicial post in Ohio to risk the uncertainty of a political campaign. We are in a real leadership crisis in our state today, I want Ohioans to know that I am one who is willing to take the risk for the privilege—and it is a privilege—of serving them in the State House.

I am free to confess that it has been my great ambition to be Governor of Ohio. Not just to be Governor, but to be in reality the chief executive of the state; to be a strong factor in securing legislation that will build dignity into the life of the people, laws that should make safe the vital principles of representative government. To lead in achieving such results would be the realization of my highest aspiration.

You may expect that I will journey to every area of this state to set forth my ideas to accomplish this goal. I shall present my program issue by issue.

People don't always agree with me. But they always know where Frank Celebrezze stands. And, above all, through four statewide elections they've shown through progressively greater majorities that they trust me and respect my performance of duties as Chief Justice. Such confidence was particularly gratifying in the 1980 election returns when my candidacy carried 87 of Ohio's 88 counties.

I will inform the public, directly, what to expect from a Celebrezze administration—on jobs, senior citizens, crime and justice, the budget, education, mass transportation, energy and our environment—all of the matters that concern Ohioans including how and where the administration of state government can be so much more effective.

The plain fact is that we can no longer accept a state administration which lurches from crisis to crisis—spending more, delivering less and watching the quality of Ohio life decline. For example, nearly 13 per cent of our people—643,000 men and women—are now out of work. Our situation demands straight talk and unconventional action. We need to recapture control of Ohio's destiny.

My campaign will never be able nor would I propose that it match my opponents' financial warchests. They have tremendous built-in advantages and will spend millions.

However, Ohioans showed again last November that their vote cannot be bought. All the media in the world, millions of dollars of it, could not pass Issue 1; and the more they spent, the worse it got.

Our Ohio voters have shown their wisdom repeatedly in the past. They know when they're being manipulated, and they also realize instinctively who is truly an independent person speaking his own mind, but always in the public's interest.

One more thing before I close. I want to be Governor because I believe there are millions of honest Ohioans who feel that the system isn't working for them. I believe Ohio deserves better, and I am confident that my candidacy is best for Ohio.

Thank you very much.

Frank D. Celebrezze
Chief Justice

January 15, 1982

Form No. 30B—Prescribed by Secretary of State, 1-76

POLITICAL COMMITTEE FINANCE REPORT

(To be filed by the political committee of any organization, association or group of persons other than a candidate's campaign committee or a political party)

Committee: APPRECIATION DINNER COMMITTEE

Treasurer: A. W. MININNI

Address: 2878 Sherwood Road, Columbus, Ohio 43209

TYPE OF REPORT: (CHECK ONE)		TYPE OF ELECTION: (CHECK ONE)	
Pre-election	☐	Primary	☐
Post-election	☐	General	☐
Non-election year	☒	Special	☐
Annual Report	☒		

Number of pages included in this report:	Forty (40)
Date of election to which this report relates:	N/A
Amount brought forward from last report:	$—0—
Total Contributions this report:	*$47,906.21
Total Expenditures this report:	**$13,712.86
Balance on Hand this report:	$34,193.35
Outstanding loans, debts or obligations:	$—0—
Disposition intended for balance:	Advance the public image of Frank D. Celebrezze

I, A. W. MININNI, hereby declare under penalty of election falsification that the foregoing information, together with the information contained on each of the pages attached hereto and submitted herewith, is a full, true, and itemized statement setting forth in detail all contributions received and ex-

(Name of Treasurer)

penditures made by the above named committee since its last report and the unpaid debts or obligations of that committee and the balance in my hands and the disposition intended to be made thereof.

November 27, 1981
(Date)

A. W. MININNI
(Signature of Treasurer)
A. W. MININNI

THE PENALTY FOR ELECTION FALSIFICATION IS IMPRISONMENT FOR NOT MORE THAN SIX MONTHS OR A FINE OF NOT MORE THAN $1,000 OR BOTH.

*$46,825.00	Contrib. Social Event
.00	General Donations
1,081.21	Interest
$47,906.21	Total

**$13,485.66	Expenses Social Event
227.20	General Expenses
$13,712.86	Total

RECEIVED
NOV 30, 1981
ANTHONY J. CELEBREZZE, JR.
SECRETARY OF STATE

Form No. 30-J. prescribed by Secretary of State (9-74)

Designation of Treasurer

By Political Committee or Political Party Committee

(To be filed not later than the date of the first statement required by Division (A) of Section 3517.10 of the Ohio Revised Code. Designation may be in any form which provides the following information)

Name of Party Committee or Political Committee: Appreciation Dinner Committee.

Name of Treasurer: A. W. Mininni.

Address: 2878 Sherwood Road, Columbus, Ohio 43209.

Date of this statement: November 27, 1981.

☒ Initial Statement
☐ Supplement Statement
} Check One

Full Name and Address of Each Deputy Treasurer:

RECEIVED
NOV 30, 1981
ANTHONY J. CELEBREZZE, JR.
SECRETARY OF STATE

A. W. MININNI
(SIGNATURE OF OFFICER OF COMMITTEE)
A. W. Mininni, Treasurer

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Form No. 31A—Prescribed by Secretary of State, 7-74

STATEMENT OF CONTRIBUTIONS

APPRECIATION DINNER COMMITTEE
(FULL NAME OF COMMITTEE)

DATE Month	Day	Year	FROM WHOM RECEIVED	ADDRESS	WHAT RECEIVED	VALUE Dollars	Cents
			See attached Sheets				
			General Donations				00.00
			*Contributions for Social Events are Listed on Form 31E				$46,825.00
				Total Contributions this Page.....	$		$46,825.00

Form No. 31B—Prescribed by Secretary of State, 7-74

STATEMENT OF EXPENDITURES

APPRECIATION DINNER COMMITTEE
(FULL NAME OF COMMITTEE)

Month	DATE Day	Year	TO WHOM PAID	ADDRESS	PURPOSE OF EXPENDITURE	AMOUNT Dollars-Cents
			See attached sheets			
4	30	81	BancOhio	51 North High, Columbus, Ohio 43215	Checking service charge	2.01
5	12	81	Jacob A. Schlosser	4937 West Broad, Columbus, Ohio 43215	Refund	25.00
6	23	81	Salute to Vern Riffe	Treas., Harry Lehman, 50 West Broad, Columbus, Ohio 43215	Donation	150.00
9	28	81	Friends of Ferguson	Treas., Vincent J. Gilclay, 88 East Broad Street, Columbus, Ohio 43215	Donation	50.00
10	30	81	BancOhio	51 North High, Columbus, Ohio 43215	Checking service charge	.19
				Total Expenditures this page		$227.20

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Form 31E—Prescribed by Secretary of State, 7-74

STATEMENT OF CONTRIBUTIONS FOR SOCIAL ~~OR FUNDRAISING~~ EVENTS

APPRECIATION DINNER COMMITTEE
(FULL NAME OF COMMITTEE)

Month	DATE Day	Year	FROM WHOM RECEIVED	ADDRESS	WHAT RECEIVED	VALUE Dollars-Cents
			See attached sheets			
4	27	81	Columbus			46,825.00
				Total Contributions reported on this form		$46,825.00
				Subtract Total Expenditures reported on Form No. 31F		$13,712.86
				NET CONTRIBUTION from Social Event		$33,112.14

(Enter "NET Contribution from Form No. 31E"
as one contribution on Form No. 31A)

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4/1/81	A.W. Mininni 2878 Sherwood Road Columbus, Ohio 43215.....	Cash	$100.00
4/1/81	William Mitchell, Jr. 3114 Essex Road Cleveland Heights, Ohio 44118.....	Cash	$100.00
4/1/81	John Yurkiw 5963 State Road Parma, Ohio 44134.....	Cash	$100.00
4/1/81	Primo M. Damiani 3412 Monroe Street Bellaire, Ohio 43906.....	Cash	$100.00
4/1/81	Michael Shane 511 Terminal Tower Cleveland, Ohio 44113.....	Cash	$100.00
4/1/81	Samuel J. Agnello 16964 Woodleaf Strongsville, Ohio 44136	Cash	$100.00
4/14/81	Larry Rich 250 Standard Building Cleveland, Ohio 44113.....	Check	$100.00
4/14/81	Bessie J. Cassaro 250 Standard Building Cleveland, Ohio 44113.....	Check	$100.00
4/14/81	Herbert Palkovitz 1300 Standard Building Cleveland, Ohio 44113.....	Check	$200.00
4/14/81	Pamela Bansci 11740 Clifton Boulevard Lakewood, Ohio 44107.....	Check	$100.00
4/14/81	Joseph Bansci 1722 Superior Building Cleveland, Ohio 44114.....	Check	$100.00
4/14/81	William Mitchell, Jr. 3114 Essex Road Cleveland, Ohio 44118.....	Check	$200.00
	Total Contributions this Page.....		$1,400.00

4/17/81	Spangenberg, Shibley, Traci & Lancione 1500 National City Bank Building Cleveland, Ohio 44114.....	Check	$200.00
4/17/81	Joseph A. Oths Reese Building 16 East Broadway Wellston, Ohio 45692.....	Check	$100.00
4/17/81	Nelson Lancione 42 East Gay Street Columbus, Ohio 43215.....	Check	$200.00
4/17/81	Kalk & Valore 75 Public Square Cleveland, Ohio 44113.....	Check	$200.00
4/17/81	Harold Ticktin 930 Keith Building Cleveland, Ohio 44115.....	Check	$100.00
4/17/81	Bernard Cohen 840 Strawberry Hill Road, East Columbus, Ohio 43213.....	Check	$100.00
4/17/81	J.D. Bryant 115 West Main Street Wilmington, Ohio 45177.....	Check	$100.00
4/17/81	Catri, Howells, Hellam & Owens 165 East Washington Row Sandusky, Ohio 44870.....	Check	$100.00
4/17/81	Donald P. Traci 1500 National City Bank Building Cleveland, Ohio.....	Check	$100.00
4/17/81	West-O-Pac Andrew J. McLardine, Treasurer 2500 Terminal Tower Cleveland, Ohio 44113.....	Check	$1,000.00
4/17/81	Laborers International Union of North America, Local 310 Elso D'Eusanio, Treasurer 3250 Euclid Avenue Cleveland, Ohio 44115.....	Check	$1,000.00

4/22/81	Primo M. Damiani 3412 Monroe Street Bellaire, Ohio 43906.....	Check	$600.00
	Total Contributions this Page.....	$3,800.00	
4/22/81	David Tozzi 1218 Birch Street Bellaire, Ohio 43906.....	Check	$100.00
4/22/81	Henry L. DeGenova 3635 Belmont Street Bellaire, Ohio 43906.....	Check	$200.00
4/22/81	Karen L. Stoiker 29124 Westwood Drive Bay Village, Ohio 44140.....	Check	$100.00
4/23/81	Rose Yurkiw 3963 State Road Parma, Ohio 44134	Check	$100.00
4/23/81	Walter N. Foster Suite 805, Fourth & Race Tower 105 West Fourth Street Cincinnati, Ohio 45202.....	Check	$100.00
4/23/81	Gregory M. Nolan 3639 Glenmore Avenue Cincinnati, Ohio.....	Check	$100.00
4/23/81	Arnold S. Levine 324 Reading Road Cincinnati, Ohio 45202.....	Check	$200.00
4/23/81	Jessie J. Tebben Virginia A. Wilson 5896 Thornhill Avenue Cincinnati, Ohio.....	Check	$100.00
4/23/81	John W. Peck Susan B. Peck 44 Applewood Drive Cincinnati, Ohio.....	Check	$100.00
4/23/81	Mark D. Blocher 2929 Annwood Street Cincinnati, Ohio 45206	Check	$200.00

4/23/81	John M. Anderson 2200 First National Bank Center Cincinnati, Ohio 45202.....	Check	$100.00
4/23/81	David S. Levine 2324 Ohio Avenue Cincinnati, Ohio 45219.....	Check	$100.00
	Total Contributions this Page.....		$1,500.00
4/23/81	John E. Tierney 7026 Britton Avenue Cincinnati, Ohio 45227.....	Check	$100.00
4/23/81	Nicholas A. Perrino 806 Main Street Cincinnati, Ohio 45202.....	Check	$100.00
4/23/81	Timothy T. Tighe 2404 Madison Avenue Cincinnati, Ohio.....	Check	$100.00
4/23/81	Kelly & Mulholland 4353 Montgomery Road Norwood, Ohio 45212.....	Check	$400.00
4/23/81	Reno J. Menapace 150 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Firepac Local Number 93, Tres., Elmer Khal 10301 Lake Avenue, 613 Cleveland, Ohio 44102.....	Check	$1,000.00
4/23/81	Robert I. Zashin 250 Standard Building Cleveland, Ohio 44113.....	Check	$200.00
4/23/81	Ohio House Democratic Committee Treasurer, Vernal Riffe, Jr. 280 East Rich Street Columbus, Ohio 43215.....	Check	$1,000.00
4/23/81	Lewis J. DiRosario 150 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Ohio AFL-CIO Warren J. Smith, Treasurer 271 East State Street Columbus, Ohio 43215.....	Check	$100.00

4/23/81	Theodore R. Saker 3887 Indianola Avenue Columbus, Ohio 43214.....	Check	$100.00
4/23/81	S. P. Dunkie 279 North Columbia Avenue Columbus, Ohio 43209.....	Check	$100.00
4/23/81	Gavin R. Larrimer 165 N. High Street Columbus, Ohio 43215.....	Check	$100.00
	Total Contributions this Page.....		$3,500.00
4/23/81	Craig N. Alayson 165 N. High Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Paul J. Navin 165 N. High Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	David L. Durschnitt 73 North Parkview Avenue Columbus, Ohio 43209.....	Check	$100.00
4/23/81	Jinx Statler Beachler 1952 Aberdeen Drive Columbus, Ohio 43220.....	Check	$100.00
4/23/81	Daniel R. Volkema 50 West Broad Street, Suite 1006 Columbus, Ohio 43215.....	Check	$200.00
4/23/81	Thomas F. Iancono 5590 Dublin Road Dublin, Ohio 43017.....	Check	$200.00
4/23/81	Terrence W. Larrimer 165 N. High Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	N. Elizabeth Ashford 789 City Park Avenue Columbus, Ohio 43206.....	Check	$100.00
4/23/81	Paul J. Bilderback 1966 Morse Road Columbus, Ohio 43229.....	Check	$100.00

4/23/81	Brian Lewis 773 Riverview Drive Columbus, Ohio 43202.....	Check	$100.00
4/23/81	Porter, Wright, Morris & Arthur 37 West Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Thomas L. Twyford Court House Square 501 South High Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Jeffrey H. Lewis 5448 Ashford Road Dublin, Ohio 43017.....	Check	$200.00
	Total Contributions this Page.....		$1,600.00
4/23/81	John J. Duffey 20 East Broad Street, Suite 400 Columbus, Ohio 43215.....	Check	$300.00
4/23/81	Chester, Saxbe, Hoffman & Willcox Eight East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Dean G. Reinhard German Village 576 South Third Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Philip Q. Zauderer 52 West Whittier Street Columbus, Ohio 43206.....	Check	$100.00
4/23/81	George W. Twyford 6684 Woodsedge Drive Reynoldsburg, Ohio 43068 .	Check	$100.00
4/23/81	George W. Twyford 6684 Woodsedge Drive Reynoldsburg, Ohio 43608 .	Check	$100.00
4/23/81	Stanley J. Bowers 21 East State Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Paul A. Corey 7755 Candlewood Lane Worthington, Ohio 43085 ...	Check	$200.00

4/23/81	Harry Lewis 360 South Third Columbus, Ohio 43215.....	Check	$100.00
4/23/81	F.A. Mac Donald 9347 North State Route 60, N.W. McConnelsville, Ohio 43756.....	Check	$200.00
4/23/81	John Corven 5256 Butternut Court, East Columbus, Ohio 43229.....	Check	$200.00
4/23/81	Ohio State Building & Construction Trades Council-Educational Fund Joseph F. Sedivy, Treasurer 236 East Town Street Columbus, Ohio 43215.....	Check	$200.00
	Total Contributions this Page.....		$1,800.00
4/23/81	Robert L. Summers 5897 Wilcox Dublin, Ohio 43017.....	Check	$100.00
4/23/81	Glander, Brant, Ledman & Newman 250 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/23/81	Joe J. Giffi 6255 Skywae Drive Columbus, Ohio 43229.....	Check	$ 25.00
4/23/81	C.D. Hart 575 Tucker Drive Worthington, Ohio 43085 ...	Check	$100.00
4/23/81	R.E. Murphy 73 Aldrich Road Columbus, Ohio 43214.....	Check	$100.00
4/23/81	Tom McGovern 810 East Dublin-Granville Road Columbus, Ohio 43229.....	Check	$100.00
4/27/81	Reddy, Gray & Meek RGM Commercial Building 5039 Turney Road Garfield Heights, Ohio 44125.....	Check	$300.00

4/27/81	Shulman & Schulman 748 Standard Building Cleveland, Ohio 44113	Check	$200.00
4/27/81	Aaron Jacobson Engineers Building Cleveland, Ohio 44114	Check	$100.00
4/27/81	Joel Z. Hyatt 1016 West 58th Street Kansas City, Missouri 64113	Check	$100.00
4/27/81	Barnum, McCafferty & Perelman 43 East Bridge Street Berea, Ohio 44017	Check	$100.00
4/27/81	Bernard B. Direnfeld 33 Public Square Cleveland, Ohio 44113	Check	$100.00
	Total Contributions this Page		$1,425.00
4/27/81	Ned L. Mann Hanna Building Cleveland, Ohio 44115	Check	$100.00
4/27/81	Alfred C. Grisanti 1370 Ontario Street Cleveland, Ohio 44113	Check	$100.00
4/27/81	Connor & Zatezalo 8 East Broad Street Columbus, Ohio 43215	Check	$200.00
4/27/81	Robert H. Milbaugh Mihlbaugh Building Lima, Ohio 45802	Check	$200.00
4/27/81	William Ahern 50 W. Broad Street Columbus, Ohio 43215	Check	$100.00
4/27/81	Robert E. Leach 325 East Longview Avenue Columbus, Ohio 43202	Check	$100.00
4/27/81	Paul R. Gingher 311 East Broad Street Columbus, Ohio 43215	Check	$100.00

4/27/81	Topper, Alloway, Goodman, DeLeone & Duffey 20 East Broad Street Columbus, Ohio 43215.....	Check	$200.00
4/27/81	David J. Young 250 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/27/81	David S. Bloomfield 50 West Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/27/81	Barkan & Neff 50 West Broad Street Columbus, Ohio 43215.....	Check	$200.00
4/27/81	Stephen Avakian 88 East Broad Street Suite 2065 Columbus, Ohio 43215.....	Check	$100.00
4/27/81	3-1-0 Social Club Anthony Leoni, Treasurer 15812 Rockside Road Maple Heights, Ohio 44137	Check	$1,000.00
	Total Contributions this Page.....		$2,600.00
4/27/81	Thomas M. Shaughnessy 11510 Buckeye Road Cleveland, Ohio 44104.....	Check	$100.00
4/27/81	Catherine Jackson 6154 Zehman Drive Brook Park, Ohio 44142.....	Check	$300.00
4/27/81	Ohio Academy of Trial Lawyers Don C. Iler, Treasurer 88 East Broad Street Columbus, Ohio 43215.....	Check	$1,000.00
4/27/81	Wayne G. Willis c/o Block Management 1900 West 47th Place Westwood, Kansas 66205...	Check	$100.00
4/29/81	David S. Bloomfield 50 West Broad Street Columbus, Ohio 43215.....	Check	$300.00

4/29/81	Paul F. Ward 50 West Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/29/81	Jay B. White Standard Building Cleveland, Ohio.....	Check	$200.00
4/29/81	Frank Mancino 1 Public Square Cleveland, Ohio 44113.....	Check	$100.00
4/29/81	Paul Mancino, Jr. 1 Public Square Cleveland, Ohio 44113.....	Check	$100.00
4/29/81	Philip A. Mesi 518 Engineers Building Cleveland, Ohio 44114.....	Check	$100.00
4/29/81	R.V. Parchen P.M. DeAngelo 100 East Broad Street Columbus, Ohio 43215.....	Check	$200.00
4/29/81	Jerry Riseling 1 East Livingstone Road Columbus, Ohio 43215.....	Check	$200.00
	Total Contributions this Page.....		$2,800.00
4/29/81	Robert Bennett Stephen Klonoski 608 Engineers Building Cleveland, Ohio 44114.....	Check	$100.00
4/29/81	Thomas Lenahan 23203 Lorain Road North Olmsted, Ohio 44070	Check	$100.00
4/29/81	Daniel R. Volkema 50 West Broad Street Suite 1006 Columbus, Ohio 43215.....	Check	$200.00
4/29/81	Laborers International Union of North America Thomas J. Arconti, Treasurer Local 423 Columbus, Ohio 43205.....	Check	$200.00

4/29/81	O.C.S.E.A. Political Action Committee Ronald C. Aledander, Treasurer 88 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/29/81	John S. DeLibera 88 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
4/29/81	United Auto Workers Ohio State Political Action Committee Charles Bowling, Edgar Hinton, Treasurers 133 East Livingstone Road Columbus, Ohio 43215.....	Check	$1,000.00
4/29/81	Harry D. Wrights 369 Harding Road Columbus, Ohio 43209.....	Check	$200.00
4/29/81	Albert A.Yannon 21 East State Street Columbus, Ohio 43215.....	Check	$200.00
4/29/81	Wolske & Blue 580 South High Street Columbus, Ohio 43215.....	Check	$400.00
	Total Contributions this Page.....	$2,600.00	
4/29/81	Stanley R. Jurus, Jr. 1375 Dublin Road Columbus, Ohio 43215.....	Check	$ 200.00
4/29/81	Charles T. Kaps 50 West Broad Street Columbus, Ohio 43215.....	Check	$ 100.00
4/29/81	Stanley B. Dritz 50 West Broad Street Columbus, Ohio 43215.....	Check	$ 200.00
4/29/81	Bricker & Eckler 100 East Broad Street Columbus, Ohio 43215.....	Check	$ 200.00
4/29/81	Richard E. Orewieler 2244 Mansfield Lucas Road Mansfield, Ohio 44905	Check	$ 100.00

4/29/91	J. Ross Haffey, Jr. 5001 Mayfield Road Lyndhurst, Ohio 44124.....	Check	$1,000.00
4/29/81	Thomas G. Kelley 948 Engineers Building Cleveland, Ohio 44114.....	Check	$ 100.00
4/29/81	G. Gary Tyack 145 East Rich Street Columbus, Ohio 43215.....	Check	$ 100.00
4/29/81	Sheldon G. Adelman 485 East 140th Street Cleveland, Ohio 44110.....	Check	$ 100.00
4/29/81	Frederick K. Jones 4755 West 150th Street Cleveland, Ohio 44135.....	Check	$ 100.00
4/29/81	Richard I. Klein 1700 Ohio Savings Plaza Cleveland, Ohio 44114.....	Check	$ 100.00
4/29/81	Bernard R. Davis Room 405, Richland Bank Building 3 North Main Street Mansfield, Ohio 44902	Check	$ 100.00
	Toal Contributions this Page.....		$2,400.00
4/29/81	Robert I. Zashin 250 Standard Building Cleveland, Ohio 44113.....	Check	$ 100.00
4/29/81	Anna Thomas 10401 Richland Avenue Garfield Heights, Ohio 44125.....	Check	$ 200.00
4/29/81	Samuel J. Agnello 666 Euclid Building Cleveland, Ohio 44114.....	Check	$ 300.00
4/29/81	Michael L. Barr 63 East Main Street Logan, Ohio 43138.....	Check	$ 25.00
4/29/81	Ronald G. Heiber 414 East Main Street Lancaster, Ohio 43130.....	Check	$ 50.00

4/29/81	Charles Lantz Equitable Building Lancaster, Ohio 43130.....	Check	$ 200.00
4/29/81	Teena Mitchell 3114 Essex Road Cleveland Heights, Ohio 44118.....	Cash	$ 100.00
4/29/81	E. J. Signoracci 2307 Canterbury Road Columbus, Ohio 43221.....	Check	$ 200.00
4/29/81	Marvin E. White Ann D. White 2936 Halstead Road Columbus, Ohio 43221.....	Check	$ 25.00
4/29/81	Donna Jackson 6154 Zehman Drive Brook Park, Ohio 44142.....	Cash	$ 25.00
4/29/81	Paul Bigley 6902 Ardelle Dr. Reynoldsburg, Ohio 43068 .	Check	$ 25.00
4/29/81	George Orlando 3104 Wareham Road Columbus, Ohio 43221.....	Check	$ 100.00
4/29/81	John V. Donnelly 711 Williamson Building Cleveland, Ohio 44114.....	Check	$ 100.00
	Total Contributions this Page.....	$1,450.00	
4/29/81	Joseph W. Caterini 16097 Ramona Drive Middleburg Heights, Ohio 44130.....	Check	$100.00
4/29/81	Charles H. Spain, Jr. 2749 Ashley Road Shaker Heights, Ohio 44122	Check	$100.00
4/29/81	Thomas E. Morgan 50 West Broad Street Columbus, Ohio 43215.....	Check	$ 25.00
4/29/81	Burt Fulton 2278 Valley View Rocky River, Ohio 44116....	Check	$100.00

4/29/81	Thomas Escovar 28019 Knickerbocker Road Bay Village, Ohio 44140.....	Check	$100.00
4/29/81	Gerald A. Berk 55 Public Square, 18th Floor Cleveland, Ohio 44113.....	Check	$100.00
4/29/81	Paul S. Sanislo 710 Standard Building Cleveland, Ohio 44113.....	Check	$100.00
4/29/81	Helene H. Christiansen R.D. 4 Harlan Rd. Mansfield, Ohio 44903	Check	$200.00
4/29/81	Thomas L. Cole 28 Park Ave., W. Mansfield, Ohio 44902	Check	$100.00
4/29/81	Frank Ardis, Jr. 1031 Laurelwood Rd. Mansfield, Ohio 44907	Check	$100.00
4/29/81	Donald Moore 140 Sherman Avenue Mansfield, Ohio 44906	Check	$100.00
4/29/81	Samuel T. Gaines 1700 Ohio Savings Plaza Cleveland, Ohio 44114.....	Check	$100.00
4/29/81	Bruno A. Molica 720 Overleaf Ct. Mansfield, Ohio 44904	Check	$100.00
	Total Contributions this Page.....		$1,325.00
4/29/81	Mary Grace Morrison 553 East Townview Circle Mansfield, Ohio 44907	Check	$100.00
4/29/81	Alice M. Alleman 844 W. Third St. Mansfield, Ohio 44906	Check	$100.00
4/29/81	Donna M. Catliota 13415 Shaker Blvd. Cleveland, Ohio 44120.....	Check	$100.00
4/29/81	Marshall J. Wolf 1700 Ohio Savings Plaza Cleveland, Ohio 44114.....	Check	$100.00

4/29/81	Melvin S. Schwarzwald 18523 Parkland Dr. Shaker Heights, Ohio 44122	Check	$100.00
4/29/81	Mark A. Rock 16179 Windsor Drive Strongsville, Ohio 44136	Check	$100.00
4/29/81	Sophie P. Klide 515 32nd Street, N.W. Canton, Ohio 44709.....	Check	$100.00
4/29/81	Paul Stergios 1241 Burd, N.E. Massillon, Ohio 44646.....	Check	$100.00
4/29/81	Western Start County Democratic Men's Club J.D. Ferrero, Treasurer 807 Main Ave., West Massillon, Ohio 44646.....	Check	$100.00
4/29/81	J.D. Ferrero 807 Main Ave., West Massillon, Ohio 44646.....	Check	$100.00
4/29/81	Gary H. Rand 3405 Beivoir Blvd. Beachwood, Ohio 44122	Check	$100.00
4/29/81	John M. Brooke 602 Brooke Lane Bay Village, Ohio 44140.....	Check	$100.00
	Total Contributions this Page.....		$1,200.00
4/29/81	Charles Lantz Equitable Building Lancaster, Ohio 44130	Check	$ 200.00
4/29/81	Dominic J. Fallon 2696 Rocklyn Road Shaker Heights, Ohio 44122	Check	$ 200.00
4/29/81	Don C. Iler 1988 Laurel Hill Drive South Euclid, Ohio 44121....	Check	$ 300.00
4/29/81	Michael C. Hanley 3733 Park East, Suite 106 Beachwood, Ohio 44122	Check	$ 100.00

4/29/81	Michael C. Mural 291 Cherry Lane Seven Hills, Ohio 44131	Check	$ 100.00
4/29/81	Sam Sharaba 1825 Newbury Court Westlake, Ohio 44145	Check	$ 100.00
4/29/81	Joyce E. Barrett 1400 Standard Building Cleveland, Ohio 44113.....	Check	$100.00
4/29/81	Nick A. Mandanici 7771 Plantation Drive Brecksville, Ohio 44141.....	Check	$ 100.00
4/29/81	Joseph C. Domiano 1328 Standard Building Cleveland, Ohio 44124.....	Check	$ 100.00
4/29/81	Leon L. Levion 408 Masonic Temple Boulevard Zanesville, Ohio 43701.....	Check	$ 100.00
4/29/81	Paul Stergios 1241 Burd, N.E. Massillon, Ohio 44646.....	Check	$ 100.00
5/5/81	Roger P. Conroy 1081 Birch Street Bellaire, Ohio 43906.....	Check	$ 100.00
5/5/81	Primo Damiani 3412 Monroe Street Bellaire, Ohio 43906.....	Check	$ 200.00
5/5/81	Carol Damiani 1653 Westwood D Columbus, Ohio 43212.....	Check	$ 200.00
	Total Contributions this Page.....		$2,000.00
5/5/81	Dan Platt 23810 East Baintree Road Beachwood, Ohio 44122	Check	$1,000.00
5/1/81	Marshall I. Nurenberg Engineers Building Cleveland, Ohio 44114.....	Check	$ 100.00
5/5/81	Jerome M. Ellerin 3305 Havel Dr. Beachwood, Ohio 44122	Check	$ 100.00

5/5/81	Alan Apisdorf 4107 Linnell Road South Euclid, Ohio 44121....	Check	$ 600.00
5/5/81	Michael J. Occhionero 4932 Countryside Lane Lyndhurst, Ohio 44124.....	Check	$ 100.00
5/5/81	Angelo J. Gagliardo 6155 Ridgebury Road Mayfield Village, Ohio 44124.....	Check	$ 100.00
5/5/81	James E. Behrens 7821 Dorothy Avenue Parma, Ohio 44129.....	Check	$ 100.00
5/5/81	William L. Tomson, Jr. 18300 Shurmer Road Strongsville, Ohio 44136	Check	$ 100.00
5/5/81	Larry Crystal 900 Illuminating Building Cleveland, Ohio 44113.....	Check	$ 100.00
5/5/81	Salvatore P. Jeffries 33 Public Square Building Suite 801 Cleveland, Ohio 44113.....	Check	$ 100.00
5/5/81	Frank K. Isaac 1 Erieview Plaza Cleveland, Ohio 44114.....	Check	$ 100.00
5/5/81	John Hildebrand 21360 Center Ridge Road Rocky River, Ohio 44116....	Check	$ 400.00
5/5/81	Mizanin Reporting Service James M. Mizanin 507 Terminal Tower Cleveland, Ohio 44113.....	Check	$ 100.00
	Total Contributions this Page.....		$3,000.00
5/5/81	James W. Burke, Jr. 21360 Center Ridge Road Suite 200 Rocky River, Ohio 44116....	Check	$200.00

5/5/81	Stanley L. Josselson 1308 Williamson Building Cleveland, Ohio 44114.....	Check	$200.00
5/5/81	George W. Lutjen 816 Engineers Building Cleveland, Ohio 44114.....	Check	$100.00
5/5/81	Martin J. Murphy 816 Engineers Building Cleveland, Ohio 44114.....	Check	$100.00
5/5/81	Robert E. Lazzaro 13317 Madison Avenue Lakewood, Ohio 44107.....	Cash	$100.00
5/5/81	Raymond J. Costanzo 13317 Madison Avenue Lakewood, Ohio 44107.....	Cash	$100.00
5/5/81	Cleveland Building and Construction Trades Council Francis Jones, Treasurer 3250 Euclid Avenue, Suite 280 Cleveland, Ohio 44115.....	Check	$200.00
5/5/81	John F. Seelie Suite 1111 Seventy-Five Public Square Cleveland, Ohio 44113.....	Check	$100.00
5/5/81	Carpenters District Council Hy Dritz, Treasurer 3615 Chester Avenue Cleveland, Ohio 44114.....	Check	$500.00
5/6/81	Carlton S. Dargusch 218 East State Street Columbus, Ohio 43215.....	Check	$100.00
5/6/81	Herbert R. Brown 52 East Gay Street Columbus, Ohio 43215.....	Check	$100.00
5/6/81	Thomas M. Taggart 52 East Gay Street Columbus, Ohio 43215.....	Check	$100.00
	Total Contributions this Page.....		$1,900.00

5/6/81	Edgar A. Strause 2420 W. Lane Avenue Columbus, Ohio 43221.....	Check	$100.00
5/6/81	George W. Twyford 6684 Woodsedge Drive Reynoldsburg, Ohio 43068 .	Check	$100.00
5/6/81	George W. Twyford 6684 Woodsedge Drive Reynoldsburg, Ohio 43068 .	Check	$100.00
5/6/81	John B. Higgins 733 Latham Court Columbus, Ohio 43215.....	Check	$100.00
5/6/81	Napoleon A. Bell 180 E. Broad Street Columbus, Ohio 43215.....	Check	$100.00
5/6/81	James P. Kennedy 4500 Dublin Road Columbus, Ohio 43220.....	Check	$100.00
5/6/81	Dominic J. Chieffo 529 S. Third Street Columbus, Ohio 43215.....	Check	$100.00
5/6/81	Pete O'Grady 41 South High Street Columbus, Ohio 43215.....	Check	$200.00
5/6/81	Charles D. Hill 2555 Harrison Road Columbus, Ohio 43204.....	Check	$100.00
5/6/81	Kenneth D. Beck 52 East Gay Street Columbus, Ohio 43215.....	Check	$100.00
5/6/81	George W. Coen P. O. Box 1028 Suite 234 Lancaster, Ohio 43130.....	Check	$200.00
5/6/81	Calig & Waterman 683 East Broad Street Suite 200 Columbus, Ohio 43215.....	Check	$500.00
	Total Contributions this Page.....		$1,800.00

5/6/81	Richard L. Lancione 3800 Jefferson Street Bellaire, Ohio 43906.....	Check	$ 200.00
5/6/81	Donald B. Smith 50 W. Broad Street Columbus, Ohio 43215.....	Check	$ 100.00
5/6/81	Marsha Zashin 250 Standard Building Cleveland, Ohio 44114.....	Cash	$ 100.00
5/6/81	Edward F. Borku, Sr. 15578 P.O. Box Columbus, Ohio 43215.....	Check	$ 100.00
5/6/81	Melvin L. Schottenstein The Midland Building 250 East Broad Street Columbus, Ohio 43215.....	Check	$ 100.00
5/6/81	Jacob A. Schlosser 4937 W. Broad Street Columbus, Ohio 43228.....	Check	$ 25.00
5/7/81	Jayne Zuberbuhler 888 Van Dyke Ave., Apt. B-3 Cincinnati, Ohio 45226.....	Check	$ 100.00
5/7/81	Daniel J. Crowley 4121 Smith Road Norwood, Ohio 45212.....	Check	$ 300.00
5/7/81	Fred L. Corder 3067 Winding Trails Edgewood, Kentucky 41017.....	Check	$ 100.00
5/7/81	R. Scott Croswell, III 906 Main Street Cincinnati, Ohio 45202.....	Check	$ 100.00
5/7/81	Paul Mussman 7701 Halabar Cincinnati, Ohio 45232.....	Check	$ 100.00
5/7/81	Ronald A. Zins 703 Burr Oak St. Cincinnati, Ohio 45232.....	Check	$ 100.00

5/7/81	Michael J. Wiethe 9051 Colrain Avenue Cincinnati, Ohio 45232.....	Check	$ 100.00
	Total Contributions this Page.....	$1,525.00	
5/7/81	Peter M. Bloch 755 Crevelling Lane Cincinnati, Ohio 45226.....	Check	$ 100.00
5/7/81	Grace M. Carovillano 4990 Hawaiian Terrace Cincinnati, Ohio 45223.....	Check	$ 50.00
5/7/81	Claudo S. Capannari 984 Hatch Street Cincinnati, Ohio 45202.....	Check	$ 50.00
5/7/81	Charles G. Bretz, Jr. 310 Westview Avenue Cincinnati, Ohio 45215.....	Check	$ 100.00
5/7/81	Michael P. O'Connor Fifth Floor, Barrister Building 216 E. 9th Street Cincinnati, Ohio 45202.....	Check	$ 100.00
5/7/81	Cincinnati AFL-CIO Labor Council William P. Sheehan, Treasurer Room 706 1015 Vine Street Cincinnati, Ohio.....	Check	$ 100.00
5/7/81	William A. Busemeyer 1200 American Building Cincinnati, Ohio 45202.....	Check	$ 100.00
5/7/81	Ralph P. Ginocchio 2595 Kroger Building Cincinnati, Ohio 45202.....	Check	$ 100.00
5/7/81	Tranter for State Representative Committee Peter McCarthey, Jr., Treasurer Kroger Building Cincinnati, Ohio 45201.....	Check	$100.00

5/7/81	Arthur J. Schuh Kroger Building Cincinnati, Ohio 45201.....	Check	$ 100.00
5/7/81	Ralph P. Ginocchio 2595 Kroger Building Cincinnati, Ohio 45202.....	Check	$ 100.00
5/7/81	Kathleen King (Crowley) 2777 Blue Rock #6 Cincinnati, Ohio 45239.....	Check	$ 100.00
	Total Contributions this Page.....		$1,100.00
5/7/81	Paul Cook 5527 Hamilton Avenue Cincinnati, Ohio 45224.....	Check	$ 100.00
5/12/81	Donald C. Freda 35100 Euclid Avenue Willoughby, Ohio 44094.....	Check	$ 400.00
5/12/81	Ohio Broadcasters Political Action Committee Thomas C. Sawyer, Treasurer 6506 Masefield Worthington, Ohio 43085 ...	Check	$ 100.00
5/12/81	Richard C. Pfeiffer, Jr. 16 East Broad St. Suite 1008 Columbus, Ohio 43215.....	Check	$ 100.00
5/12/81	C. Russell Thompson 2130 LeVeque Lincoln Tower Columbus, Ohio 43215.....	Check	$ 100.00
5/12/81	Barry M. Byron Suite 330 36100 Euclid Avenue Willoughby, Ohio 44094.....	Check	$ 100.00
5/12/81	Theodore R. Klammer 35100 Euclid Avenue Willoughby, Ohio 44094.....	Check	$ 100.00
5/12/81	Richard A. Hoose 30481 Bridle Path Trail Wickliffe, Ohio 44092.....	Check	$ 100.00

5/12/81	George J. Minicucci 7892 Garfield Road Mentor, Ohio 44060	Check	$100.00
5/12/81	Lynn Leary 5700 Pearl Road Parma, Ohio 44129.....	Cash	$ 100.00
5/12/81	E. W. Mastrangelo 36629 Ridge Road Willoughby, Ohio 44094.....	Check	$ 100.00
5/19/81	Martin A. Rini 545 Terminal Tower Cleveland, Ohio 44113.....	Check	$ 100.00
	Total Contributions this Page.....	$1,500.00	
5/19/81	Charles S. Tricarichi 55 Public Square, Suite 2120 Cleveland, Ohio 44113.....	Check	$ 100.00
5/19/81	Walter A. Savage 7849 Valley Villas Dr. Parma, Ohio 44130.....	Check	$ 100.00
5/19/81	C. Anthony Stavole 1604 Illuminating Building Cleveland, Ohio 44113.....	Check	$ 100.00
5/28/81	Friends of Ferguson Vincent J. Gilclay, Treasurer 88 E. Broad Street Columbus, Ohio 43215.....	Check	$ 100.00
5/28/81	Gary A. Kleinhenz 17700 Woodbury Avenue Cleveland, Ohio 44135.....	Check	$ 100.00
5/28/81	John J. Grady 20800 Center Ridge Road Cleveland, Ohio 44116.....	Check	$ 100.00
5/28/81	Jones, Day, Reavis & Pogue John W. Edwards II, Treasurer 1700 Union Commerce Cleveland, Ohio 44115.....	Check	$ 200.00

5/28/81	A. W. Mininni 2878 Sherwood Road Columbus, Ohio 43209.....	Check	$ 100.00
5/28/81	Ohio Education Association David R. Nerrson, Treasurer 225 East Broad Street P.O. Box 2550 Columbus, Ohio 43216.....	Check	$ 200.00
5/28/81	Robert A. Manning 16 East Broad Street Columbus, Ohio 43215.....	Check	$ 100.00
5/28/81	Benjamin H. Paddock 38787 Cedar Road Gates Mills, Ohio 44040.....	Check	$ 100.00
5/28/81	Edward T. Lombardo 850 S. Third Street Columbus, Ohio 43206.....	Check	$ 100.00
	Total Contributions this Page.....		$1,400.00
6/12/81	A. W. Mininni 2878 Sherwood Road Columbus, Ohio 43209.....	Check	$ 200.00
6/12/81	Richard S. Dodge First National Plaza, Suite 2000 Dayton, Ohio 45402	Check	$100.00
6/12/81	Robert L. Roderer 103 Notre Dame Avenue Dayton, Ohio 45404	Check	$200.00
6/12/81	Gerald E. Wedren 140 E. Town Street Columbus, Ohio 43215.....	Check	$100.00
7/13/81	Jerome S. Teller 1504 First National Bank Building Cincinnati, Ohio 45202.....	Check	$100.00
7/13/81	Perry & Boyuk 150 E. Broad Street Columbus, Ohio 43215.....	Check	$200.00

7/13/81	Catherine Jackson 6154 Zehman Drive Brook Park, Ohio 44142.....	Check	$100.00
7/13/81	Roger P. Conroy 1081 Birch Street Bellaire, Ohio 43906.....	Check	$200.00
7/13/81	J. Richard Emens 250 E. Broad Street Columbus, Ohio 43215.....	Check	$200.00
7/13/81	Gary L. Jones 88 East Broad Street Columbus, Ohio 43215.....	Check	$100.00
7/13/81	Jeffrey A. Rich 8803 Narin Court Dublin, Ohio 43017.....	Check	$100.00
10/15/81	Columbus Building & Construction Trades Council Robert Farrington, Treasurer 555 East Rich Street Columbus, Ohio 43215.....	Check	$100.00
10/28/81	George L. Forbes 616 Marion Building Cleveland, Ohio 44113.....	Check	$1,000.00
	Total Contributions this Page.....		$2,700.00
10/28/81	W. B. Wells 1325 Inglewood Drive Cleveland Heights, Ohio 44121.....	Check	$ 50.00
10/28/81	Leonard H. Soeder 2424 Fenwood Road University Heights, Ohio 44118.....	Check	$ 50.00
10/28/81	Timothy L. Skola 4740 West 228th Street Fairview Park, Ohio 44126.	Check	$ 50.00
10/28/81	Donald W. Morrison 60 Windrush Drive Moreland Hills, Ohio 44022	Check	$ 50.00

10/28/81	W. R. Gustaferro 3385 Chrisfield Drive Rocky River, Ohio 44116....	Check	$100.00
10/28/81	Frederic E. Fulmer 5200 Three Village Lyndhurst, Ohio 44124.....	Check	$100.00
10/28/81	Donald R. Bishop 11030 Westwind Ct. Strongsville, Ohio 44136	Check	$ 80.00
10/28/81	Robert A. George 11 Massey Dr. Westerville, Ohio 43081	Check	$ 20.00
	Total Contributions this Page.....		$ 500.00
	Total Contributions all Pages		$46,825.00

Form No. 31-F—Prescribed by Secretary of State, 7-74

STATEMENT OF EXPENDITURES FOR SOCIAL ~~OR FUNDRAISING~~ EVENTS

APPRECIATION DINNER COMMITTEE
(FULL NAME OF COMMITTEE)

DATE Month	Day	Year	TO WHOM EXPENDED	ADDRESS	PURPOSE FOR EXPENDITURE	AMOUNT Dollars	Cents
			See Attached Sheets				
4	27	81	Columbus Dinner			$13,485.66	
			Transfer from form #31B—General Expenses			227.20	
			Total Expenditures this page			$13,712.86	

197

SOCIAL EVENTS DISBURSEMENTS

4/24/81	Columbus Sheraton Hotel 50 North 3rd Street Columbus, Ohio 43215.....	Ballroom—Food	$10,490.48
4/27/81	Robert Murphy 73 Aldrich Road Columbus, Ohio 43214.....	Wine	284.20
4/27/81	Columbus Sheraton 50 North 3rd Street Columbus, Ohio 43215.....	Food	1,118.07
4/27/81	Pfeifer Printing Company 190 East Fulton Street Columbus, Ohio 43215.....	Programs	83.35
5/ 1/81	The Oxford Press 400 Lakeside Avenue, N.W. Cleveland, Ohio 44113.....	Ticket printing	205.00
5/ 5/81	Viereck Florists 179 East State Street Columbus, Ohio 43215.....	Flowers	60.00
5/ 5/81	Cleveland-Lorain Highway Coach Company 3747 Colorado Avenue Lorain, Ohio 44054.....	Bus rental	812.00
5/12/81	Jack Montag Photography 5524 Parkville Street Columbus, Ohio 43229.....	Pictures	201.28
5/29/81	Barbara Runyon 1745 North Star Road Columbus, Ohio 43212.....	Pictures	49.00
5/29/81	Ohio Bell 150 East Gay Street Columbus, Ohio 43215.....	Phone Bill	182.28
			$13,485.66

Form No. 31G—Prescribed by Secretary of State, 7-74

HONOREE'S

LIST OF CONTRIBUTORS IN ~~CANDIDATE'S~~ EMPLOY

APPRECIATION DINNER COMMITTEE
(FULL NAME OF COMMITTEE)

The following is a designation of each contributor who is an employee of a unit or department under the direct supervision or control of Frank D. Celebrezze, Honoree who currently holds the public office of Chief Justice, Ohio Supreme Court.

I hereby affirm that each contribution made by the named persons was voluntarily made.

DATE Month	Day	Year	FROM WHOM RECEIVED	ADDRESS	WHAT RECEIVED	VALUE Dollars	Cents
							00

Total Contributions this page ..... $ 00

199

Form No. 31D—Prescribed by Secretary of State, 7-74

EXPLANATION OF ANONYMOUS CONTRIBUTIONS

Appreciation Dinner Committee
(FULL NAME OF COMMITTEE)

DATE Month	Day	Year	EXPLANATION OF CIRCUMSTANCES AND REASON NOT ATTRIBUTABLE TO SPECIFIC DONOR	AMOUNT Dollars	Cents
					00

Total Anonymous Contributions..... $ 00

200

Form No. 31C—Prescribed by Secretary of State, 7-74

STATEMENT OF OUTSTANDING LOANS, DEBTS OR OBLIGATIONS

APPRECIATION DINNER COMMITTEE
(FULL NAME OF COMMITTEE)

DATE Month	Day	Year	TO WHOM OWED	ADDRESS	REASON FOR DEBT	AMOUNT Dollars	Cents
							00
Total Outstanding Loans, Debts or Obligations this page						$	00

STATEMENT OF REPAID LOANS OR ADVANCES

DATE Month	Day	Year	TO WHOM OWED	ADDRESS	REASON FOR DEBT	AMOUNT Dollars	Cents
							00
Total Repaid Loans or Advances this page						$	00

[Cancelled Checks Omitted]

IN THE SUPREME COURT OF OHIO

EDWARD BLANKENSHIP, *et. al.*,
Plaintiffs-Appellants,

Case No. 81-402

—v—

CINCINNATI MILACRON CHEMICALS, INC., *et. al.*,
Defendants-Appellees.

APPLICATION TO FILE BRIEF AS AMICUS CURIAE

STEWART R. JAFFY
CLAYMAN & JAFFY CO., L.P.A.
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Attorney for Ohio AFL-CIO,
Amicus Curiae

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Attorney for Defendants-Appellees

WILLIAM E. CLEMENTS
KONDRITZER, GOLD & FRANK
414 Walnut Street
Cincinnati, Ohio 45202
Telephone: (513) 621-1652
Attorney for Plaintiffs-Appellants

IN THE SUPREME COURT OF OHIO

EDWARD BLANKENSHIP, *et. al.*,
Plaintiffs-Appellants,

Case No. 81-402

—v—

CINCINNATI MILACRON CHEMICALS, INC., *et. al.*,
Defendants-Appellees.

APPLICATION TO FILE BRIEF AS AMICUS CURIAE

Now comes the Ohio AFL-CIO and respectfully moves this Court to grant it leave to file its Brief in this case.

Participation is desired because of the continuing interest and concern of the Ohio AFL-CIO with the laws of the State dealing with Ohio Workers' Compensation, which are directly affected by the issues presented in this case. The Ohio AFL-CIO has, over the years, been involved in extensive participation in testifying and lobbying legislation involving Workers' Compensation.

A substantial number of individuals who are members of Local Unions affiliated with the Ohio AFL-CIO are amenable to the Workers' Compensation Laws, and may be affected by the Court's decision herein.

Respectfully submitted,

STEWART R. JAFFY

Stewart R. Jaffy
Clayman & Jaffy Co., L.P.A.
21 East State Street, Suite 215
Columbus, Ohio 43215
Telephone: (614) 228-6148

Attorney for Ohio AFL-CIO,
Amicus Curiae

[CERTIFICATE OF SERVICE IS OMITTED.]

THE SUPREME COURT OF OHIO

July 30, 1981

EDWARD BLANKENSHIP *et al.*,
Appellants,

vs.

Case No. 81-1402
ENTRY

CINCINNATI MILACRON CHEMICALS, INC.,
et al.,
Appellees.

On written request and for good cause shown, it is ordered that Stewart R. Jaffy be given leave to file brief amicus curiae on behalf of Ohio AFL-CIO on July 23, 1981.

FRANK D. CELEBREZZE

Chief Justice *Judge*

In The Supreme Court Of Ohio

**APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT,
LUCAS COUNTY, OHIO**

VIRGINIA MAE KNITZ

Appellant,

—vs—

Case No.
81-256

MINISTER MACHINE CO.,

Appellee.

MOTION OF THE OHIO ACADEMY OF TRIAL LAWYERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

ROBERT M. ANSPACH
SHUMAKER, LOOP & KENDRICK
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811 Madison Avenue
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419/241-4201
Attorney for Appellee

and

RANDALL W. PEES
PEES & BEHAL
505 South High Street
Columbus, Ohio 43215
614/461-9909

*Attorney for Amicus Curiae
Ohio Academy of Trial
Lawyers*

JOHN A. HARRIS, III
GREEN, LACKEY, NUSBAUM,
PHILLIPS & HARRIS, LPA
Suite 330
Spitzer Building
Toledo, Ohio 43604
419/243-1105

Attorney for Appellant

Filed
June 8, 1981

Supreme Court of Ohio
Thomas L. Startzman, Clerk

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS SIXTH APPELLATE DISTRICT, LUCAS COUNTY, OHIO

VIRGINIA MAE KNITZ,

Appellant,

vs

MINSTER MACHINE CO.,

Appellee.

Case No. 81-265

MOTION OF THE OHIO ACADEMY OF TRIAL LAWYERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The applicant, the Ohio Academy of Trial Lawyers, respectfully moves the Court for leave to file as amicus curiae the attached brief in support of appellant Knitz's position in this case. The applicant so moves on the grounds that the applicant and its members are vitally concerned about the confusion over the distinctions between implied warranty and strict tort liability and the adverse effect of this confusion upon trial attorneys and their clients.

The Ohio Academy of Trial Lawyers is a non-profit association composed of 1700 Ohio attorneys. As provided in the Ohio Academy of Trial Lawyers' Constitution, one of the objectives is "to advance the cause of those who are damaged in person or property and who must seek redress therefore . . . ."

Clearly, the decision in this case rendered by the Court of Appeals, Sixth Appellate District, Lucas County, Ohio adversely affects the members of the Ohio Academy of Trial Lawyers and their clients by failing to provide sufficient clarification and certainty in the law in the important area of products' liability.

For the foregoing reasons, the Ohio Academy of Trial Lawyers submits that the interest of its member attorneys and their clients in the within case is substantial, and respectfully requests the Court for an order granting leave to file the attached brief amicus curiae.

Respectfully submitted,

/s/ RANDALL W. PEES

RANDALL W. PEES
Pees & Behal
505 South High Street
Columbus, Ohio 43215
614/461-9909
Attorney for Amicus Curiae
Ohio Academy of Trial Lawyers

CERTIFICATE OF SERVICE

A copy of the foregoing Motion Of The Ohio Academy of Trial Lawyers For Leave To File Brief Amicus Curiae was served, via U.S. Mail, postage prepaid, upon all counsel of record this 8 day of June, 1981.

/s/ RANDALL W. PEES

RANDALL W. PEES

Attorney for Amicus Curiae
Ohio Academy of Trial Lawyers

THE SUPREME COURT OF OHIO

June 17, 1981

VIRGINIA MAE KNITZ,
Appellant,

vs.

Case No. 81-256
ENTRY

MINSTER MACHINE CO.,
Appellee.

On written request and for good cause shown, it is ordered that Randall W. Pees be given leave to file brief amicus curiae on behalf of Ohio Academy of Trial Lawyers as of June 8, 1981.

FRANK D. CELEBREZZE

Chief Justice *Judge*

THE CLEVELAND PLAIN DEALER
THURSDAY, MARCH 11, 1982

Celebrezze Withdraws Election Bid

By Tom Diemer
and Joseph D. Rice
PD Bureau

COLUMBUS—Ohio Chief Justice Frank D. Celebrezze, in a stunning reversal, withdrew his resignation from the court yesterday and dropped out of the governor's race just hours after he said a major financial backer withdrew his support.

Celebrezze seemed to be in the race when he appeared Tuesday night at a $50-a-person reception at the Elks Hall in Parma. A few hours earlier, he had sent Gov. James A. Rhodes a letter saying he would resign from the Supreme Court bench, effective Monday.

Celebrezze did a complete about face in less than 24 hours. He cloistered himself in his chambers yesterday and at 3:30 p.m. sent Rhodes a letter rescinding his resignation. Rhodes said he would honor the request.

Rhodes, contacted last night, said Celebrezze, 53, told him he had a personal or family problem.

Celebrezze is in the second year of a six-year term as chief justice. Once before, Celebrezze changed his mind about a race. In the mid-1960s, he announced his candidacy for mayor of Cleveland. The next day, he took his petitions to the Board of Elections, but did not file them.

Celebrezze's decision yesterday shocked friends who were confident he was in the race to stay. He called his former assistant, Cleveland lawyer Lou Damiani, who would have supervised his campaign in Cuyahoga County, to tell him of the decision.

When a Plain Dealer reporter called Celebrezze's brother, Judge James P. Celebrezze of the Ohio Court of Appeals (8th District), the surprised brother said: "It's news to me."

Celebrezze's law clerk, Matthew Fitzsimmons, retrieved his resignation letter from Rhodes' office about 5:30 p.m.

Shortly after, one of Celebrezze's nine children, Steve, came rushing in. "It's good news," he said of the sudden decision, as he headed into his father's office.

When he announced Jan. 15 he would run for governor after clearing his court docket, Celebrezze said his decision was irreversible.

He had planned to be off the bench by the last week in February, but was apparently delayed by the case load. He told The Plain Dealer that week, "You can bank on it," when asked if he still intended to get in the governor's campaign.

Rhodes got Celebrezze's first letter yesterday morning and wrote back promptly, accepting the resignation.

Curiously, Celebrezze's letter revealed his resignation would not take effect until Monday at 11:59 p.m.

The judge said shortly before noon yesterday that he needed the time to clear out his office and make it ready for his successor, whom Rhodes would have appointed.

"I've got 10 years of books, papers and records," he said, adding he would not participate in any more case work this week.

By 4 p.m. yesterday, the second letter had been delivered to Rhodes. "I hereby withdraw my letter of March 9, which indicated that I would resign my Office of Chief Justice of the Ohio Supreme Court effective 11:59 p.m., Monday, March 15, 1982," Celebrezze wrote.

Celebrezze also tried to telephone Rhodes, who was out of the office at the time, but who returned the call at 5:05 p.m.

"He said he had a personal problem in the family and 'I'd like to withdraw it.' I said I would honor his request . . . I think he said family (problem). It was a short conversation," Rhodes said. "The decision was mine. I did the proper thing.

"The man said he had personal problems. I was not instructed to play politics with every little issue."

In a telephone interview, Celebrezze said the financial backer's withdrawal was the catalyst behind his decision to change his mind. He said the backer, whom he described as "a longtime friend," had promised to raise or donate $100,000 of a campaign budget of $750.00[sic].

"I guess the bottom line is that in order to run, you've got to raise that money," Celebrezze said. "Knocking out 15% of our budget and still having to raise the rest put a crimp in it and I didn't have anybody who had that kind of money I could rely on.

"It's starting to look to me like, unless you're a millionaire or have access to large amounts of money, to run for state office is going to be a millionaire's game and that's not the way government should be. I just wish somebody would come along and say, 'Hey, this guy is a common, ordinary person who has a feeling for people and I've got a million bucks and would like to see him run.' "

Case law suggests there is legal precedent for Celebrezze withdrawing a resignation that has not yet taken effect, even after the receiving party has accepted it, a state government source said.

Celebrezze faced an uphill struggle in his quest for the governor's office. He would have had to give up a $62,000 a year job for a contest against three opponents—Atty. Gen. William J. Brown, former Lt. Gov. Richard F. Celeste and Cincinnati Councilman Gerald N. Springer—who had a substantial lead over him in fund-raising and organizing activities.

THE COLUMBUS DISPATCH
THURSDAY, MARCH 11, 1982

Celebrezze Says Money Woes Sidelined Him

By Duane St. Clair
Dispatch Statehouse Reporter

Frank D. Celebrezze quit his campaign for governor Wednesday when he learned he wouldn't get campaign funds that had been promised, he said Thursday.

Celebrezze said he learned in a telephone call about 10 a.m., shortly after he resigned as chief justice of the Ohio Supreme Court, that one "longtime friend" wouldn't raise $100,000 that he had promised.

That loss was one of a series of broken promises Celebrezze said he has received in recent weeks.

Shortly before 10 a.m., Celebrezze had told Gov. James A. Rhodes he was resigning from the bench, effective next Monday. He planned to be a Democratic candidate for governor.

At 3 p.m., Rhodes accepted the resignation, but an hour after that Celebrezze asked that Rhodes allow him to withdraw it.

About 5 p.m., Rhodes said he would return Celebrezze's resignation. The governor said Celebrezze told him in a telephone conversation he decided not to resign for "personal reasons."

Celebrezze said legally he had not resigned and that there is no legal problem with his action or Rhodes'.

Celebrezze said his backers have raised about $130,000 thus far and that most of it has been spent on salaries for workers in offices the campaign committee was operating.

Celebrezze said his potential fund-givers apparently were being pressured by political opponents not to contribute to his effort. But, he said he wouldn't name anybody who was working against him.

Since Jan. 15, when he said he would resign to enter the governor's race, Celebrezze said he has had "a lot of disappointments—money, political, performance."

Besides not getting money he expected, "People who said they would do things didn't," Celebrezze said.

Celebrezze said the $100,000 was about 15 percent of his expected $750,000 campaign. He said it appears a person will have to be a millionaire or have access to large sums of money to run for state office and "that's not the way government should be."

He would have been the fourth major candidate for his party's nomination. Others are Richard F. Celeste the party's 1978 gubernatorial candidate; former Cincinnati City Councilman Jerry Springer and Attorney General William J. Brown.

Democrats have been unhappy with Celebrezze for planning to quit the bench with four years left in his term. Celebrezze said he now plans to complete his term, although he has said 12 years would be long enough for anybody to be a judge. He has been on the high court 10 years.

Celebrezze said he had a list of six persons he was considering as a running mate and that he had not asked any one of them to be on the ticket. He had said Wednesday that he expected to announce a running mate next week.

After Celebrezze resigned, Rhodes said he would appoint Justice Blanche Krupansky as chief justice and indicated he would name Franklin County Common Pleas Judge Craig Wright, also a Republican, to succeed her. Krupansky now will run for election to the term to which she was appointed last August.

CANON 7(A)(3) IN THE FIFTY STATES

1. Canon 7(A)(3) of the American Bar Association Code of Judicial Conduct states:

> "A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so."

2. The Judicial Conference of the United States, in April 1973, adopted substantially the same requirement:

> "A judge should resign his office when he becomes a candidate either in a primary or in a general election for any office." (Canon 7(2), Code of Judicial Conduct for United States Judges, 69 F.R.D. 273, 285 (1976)).

3. The following 43 states and the District of Columbia also explicitly require that judges resign in order to run for nonjudicial office:

Alabama	Ala. Code, Canons of Judicial Ethics, Canon 7(A)(2) (1977)
Alaska	Alaska Stat., Rules of Court Procedure and Administration, Code of Judicial Conduct, Canon 7(A)(3) (1974)
Arizona	Ariz. Rev. Stat. Ann., Code of Judicial Conduct, Canon 7(A)(3) (Pocket Part 1981-1982)
Arkansas	•
Colorado	Colo. Rev. Stat., Code of Judicial Conduct, Canon 7(A)(3) (1973)
Connecticut	Kaye, Mollier, 1 Conn. Prac., Code of Judicial Conduct, Canon 7(A)(3) (Pocket Part 1977)
Delaware	Del. Code Ann., The Delaware Judges' Code of Judicial Conduct, Canon 7(B) (1981)
District of Columbia	•

Florida	Fla. Rules of Court, Code of Judicial Conduct, Canon 7(A)(3) (West 1982)
Georgia	Ga. Code Ann., Title 24, App. A, Code of Judicial Conduct, Canon 7(A)(3) (1981)
Illinois	Ill. Ann. Stat. Ch. 110A, § 70 (Smith-Hurd Pocket Part 1981-82)
Indiana	Ind. Code Ann., Code of Judicial Conduct, Canon 7(A)(3) (Burns 1980)
Iowa	Iowa Code Ann., § 610 App., Code of Judicial Conduct, Canon 7(A)(2) (West 1975)
Kansas	Kan. Stat. Ann., § 20-176, Rules Relating to Judicial Conduct, Canon 7(A)(3) (1981)
Kentucky	*
Louisiana	La. Rev. Stat. Ann., Code of Judicial Conduct, Canon 7(A)(3) (West Pocket Part 1982)
Maryland	Md. Code Ann., Rule 1231, Canons of Judicial Ethics, Canon XXIX (1977)
Massachusetts	*
Michigan	Mich. Court Rules, Code of Judicial Conduct, Canon 7(A)(3) (1977)
Minnesota	Minn. Stat. Ann., Code of Judicial Conduct, Canon 7(A)(3) (West 1980)
Montana	*
Mississippi	*
Missouri	Mo. Rules of Court, Supreme Court Rule 2, Code of Judicial Conduct, Canon 7(A)(3) (1982)
Nebraska	*
New Hampshire	N.H. Court Rules, Supreme Court Rule 38, Code of Judicial Conduct, Canon 7(A)(2) (1981)
New Jersey	Rules Governing the Courts of the State of New Jersey, Part I, App., Code of Judicial Conduct, Canon 7(A)(2) (1982)

New York	29 N.Y. [Jud. App.] Law (McKinney), Code of Judicial Conduct, Canon 7(A)(3) (1975)
North Carolina	N.C. Gen. Stat. App. VII-A (Supp. 1981)
North Dakota	*
Ohio	Rules Governing the Courts of Ohio, Code of Judicial Conduct, Canon 7(A)(3) (1977); 36 Ohio St. 2d XIX, XXXII
Oklahoma	Okla. Rules of Court, Code of Judicial Conduct, Canon 7(A)(3) (1981-82)
Oregon	*
Pennsylvania	Pa. Rules of Court, Code of Judicial Conduct, Canon 7(A)(3) (1982)
Rhode Island	R.I. Gen. Laws, Canons of Judicial Ethics, Canon 27 (1976)
South Carolina	S.C. Code Ann., Supreme Court Rule 33, Code of Judicial Conduct, Canon 7(A)(3) (1976)
South Dakota	S.D. Compiled Laws Ann., § 16-2-App., Canons of Judicial Ethics, Canon 7(A)(3) (1979)
Tennessee	Tenn. Code Ann., Rule 10, Code of Judicial Ethics, Canon 7(A)(3) (1981)
Utah	*
Vermont	Vt. Stat. Ann., Title 12, App. VIII, Admin. Ord. 10, Code of Judicial Ethics, Canon 7(A)(3) (Pocket Part 1977)
Virginia	Va. Code, Supreme Court Rules, Rule 6 (1977)
Washington	Wash. Rev. Code, Rules of Court, Code of Judicial Conduct, Canon 7(A)(3) (1981)
West Virginia	W. Va. Code App., Code of Judicial Conduct, Canon 7(A)(3) (1978)
Wisconsin	Wisc. Stat. Ann., Supreme Court Rule 60.05 (West 1981)
Wyoming	Wy. Court Rules, Code of Judicial Conduct, Canon 7(A)(3) (1979)

4. Under Hawaiian law (*), a judge who becomes a candidate for nonjudicial office forfeits his judgeship.

5. Nevada law (Nev. Rev. Stat., Supreme Court Rules, Code of Judicial Conduct, Canon 7(A)(2) states that Supreme Court and District Court judges shall not become candidates for nonjudicial office.

6. Idaho law(*) requires that a judge who becomes a candidate for nonjudicial office resign or take a leave of absence.

7. California law (Cal. Civ. Code, Code of Judicial Conduct, Canon 7(A)(3) (West 1981)) and Maine law (Me. Rules of Court, Code of Judicial Conduct, Canon 7(A)(1)(d) (1982)) state that "a judge should not engage in any political activity, other than on behalf of measures to improve the law, the legal system, or the administration of justice".

8. Article III, section 19 of the Texas Constitution states that no judge shall be eligible for the legislature during the term of his judgeship. In addition, article XVI, section 65 of the Constitution prohibits County Judges and Justices of the Peace from running in general, special or primary elections for any other office, if the unexpired term of the office then held exceeds one year.

9. New Mexico (N.M. Stat. Ann., Code of Judicial Conduct (1978)) is the only state not to prohibit judges from retaining their judgeships while running for nonjudicial office.

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* Copy of provision available from counsel for petitioners or from the American Judicature Society, 200 West Monroe Street, Suite 1606, Chicago, Illinois 60606. *See also* appendix to Morial v. Judiciary Commission of Louisiana, 565 F.2d 295, 307-08 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

LIST OF SUBSIDIARIES OF CINCINNATI MILACRON INC. FROM 1981 FORM 10-K

EXHIBIT 22. SUBSIDIARIES OF REGISTRANT

	Incorporated State or Country	Date Acquired	Percentage Owned By Immediate Parent
CINCINNATI MILACRON INC.	Ohio (Registrant)	1922	
Cincinnati Milacron Marketing Co.	Ohio	1931	100%
Amertool Services, Inc.	Ohio	1949 (A)	100%
Amertool Services Corp. (a DISC)	Delaware	1971	100%
Cincinnati Milacron Japan Ltd.	Japan	1967	100%
Cincinnati Milacron-Heald Corp.	Delaware	1955	100%
Cincinnati Milacron Commercial Corp.	Delaware	1967 (A)	100%
Cincinnati Milacron Ltd.	England	1934	100%
Cincinnati Milacron-Canada Ltd.	Canada	1959	100%
Cincinnati Milacron B.V.	Netherlands	1952	100%
N.V. Vlaardingse Hattschappijtot Verhuur van Fabrieksgebouwen	Netherlands	1960	100%
N.V. Cincinnati Milacron S.A.	Belgium	1973	100%
Cincinnati Milacron S.r.l.	Italy	1966	100%
Cincinnati Milacron AG	Switzerland	1967	100%
Cincinnati Milacron International Marketing Company	Delaware	1966	100%
Coge AG	Switzerland	1970	100%
Cincinnati Milacron Hoiding Gesellschaft mbH	Austria	1970 (B)	22.2%
Cincinnati Milacron Holding Gesellschaft mbH	Austria	1970 (B)	77.8%
Cincinnati Milacron Austria Aktiengesellschaft	Austria	1976	100%
Cincinnati Milacron Handelsgesellschaft mbH	Austria	1976	100%
Cincinnati Milacron Disc Corp. (a DISC).	Connecticut	1980	100%
The Factory Power Company	Ohio	1907 (A)	91.9%
Cincinnati Milacron International Sales Corporation (a DISC)	Delaware	1971	100%
Cincinnati Milacron Assurance Ltd.	Bermuda	1977 (A)	100%

(A) Accounts not consolidated as explained in the Notes to Consolidated Financial Statements under the caption Summary of Significant Accounting Policies—Consolidation.

(B) Owned by Cincinnati Milacron International Marketing Co. (77.8%) and by Coge AG (22.2%).

LIST OF SUBSIDIARIES OF THIOKOL CORPORATION FROM 1981 FORM 10-K

EXHIBIT 22

THIOKOL CORPORATION AND SUBSIDIARIES
Listing of Subsidiaries and Affiliates

The following subsidiaries of the company are included in the consolidated financial statements. All of such subsidiaries are wholly owned:

Domestic:

- Carstab Corporation (Delaware)
- Dynachem Corporation (Delaware)
- Southwest Screens and Filters, Inc. (Texas)*
- Pacer Lubricants, Inc. (Texas)*
- Southwest Chemical International, Inc. (Texas)*
- Southwest Chemical Services Incorporated (Delaware)
- Thiokol International, Inc. (Delaware)
- Ventron International, Inc. (Massachusetts)

Foreign:

- Thiokol S.A. (Switzerland)
- Dynachem Deutschland G.m.b.H (West Germany)**
- Thiokol Canada Limited (Canada)
- Thiokol Chemicals Limited (England)
- Thiokol Fibres Canada Ltd. (Canada)
- Thiokol France S.A. (France)**
- Thiokol Photochemicals N.V. (Belgium)**
- Southwest Plastics Europe, S.A. (Belgium)*
- Kunko S.a.r.l. (Switzerland)***
- Ventron G.m.b.h. (West Germany)

* Wholly owned subsidiaries of Southwest Chemical Services Incorporated

** Wholly owned subsidiaries of Dynachem Corporation

*** Wholly owned subsidiary of Southwest Plastics Europe, S.A.

The following affiliates of the company are approximately 50% owned, and have not been consolidated in the financial statements. Investments in these affiliates, which are not material in relation to consolidated amounts, are stated at equity in the consolidated balance sheet.

Toray Thiokol Company Ltd. (Japan)—45% owned
Nisso—Ventron Co., Ltd. (Japan)—50% owned
Yoshino Thiokol Company Ltd. (Japan)—45% owned

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No. 82-10

In the Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., et al.,
Petitioners,

—against—

EDWARD BLANKENSHIP, et al.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITE,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER and ELLA AMBATE,
Petitioners,

—against—

ARLENE T. ZAK and THADDEUS O. ZAK,
Respondents.

CASE ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents frame the issues differently from Petitioner.

1. May a litigant bypass opportunities to move to disqualify a judge and raise the issue of disqualification after the decision is known to be adverse to the litigant, using information *dehors* the record that was available during the earlier stages of the case.

2. May a court presume that all the judicial acts of a prospective candidate for partisan political office are tainted by reason of the declaration of that judge of a future intent to resign the judgeship and become a candidate?

All of the Respondents join in this Memorandum in Opposition to Petition for a Writ of Certiorari. One Memorandum in Opposition has been filed because only one Petition was filed seeking a Writ of Certiorari to review the Judgments of the Supreme Court of Ohio in three separate cases, as provided in this Court's Rule 19.4.

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No. 82-10

In the Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., *et al.*,
Petitioners,

—against—

EDWARD BLANKENSHIP, *et al.*,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

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Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER
and ELLA AMBATS,
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ADELINE T. ZAK and THADDEUS O. ZAK,
Respondents.

CASE ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Respondents agree that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3) and that the Petition for a Writ of Certiorari was timely filed and is properly before this Court.

STATEMENT OF THE CASE

Respondents disagree with the statement of the case presented by Petitioners. Petitioners' sole factual support for their statement of the case is an unauthenticated press release, never admitted into evidence, which was attached to their motions for rehearing below. The Petition is replete with references to alleged facts *dehors* the record below.

1. Petitioners present a copy of a press release dated January 15, 1982, to demonstrate the candidacy of Chief Justice Celebrezze from that date. This copy is in the record below only by virtue of having been attached to briefs in support of the motions for rehearing filed in the three cases. See Petitioners' Appendix (hereafter Pet. App.) 161. Petitioners present no evidence of its release to the public.

2. The content of the alleged release refers to "plans" to become a candidate for Governor. All references to the candidacy for Governor of Ohio are in the future tense. Petitioners assume that the announcement contains an unequivocal declaration of present candidacy, thereby shortcutting a complex legal issue (whether Chief Justice Celebrezze became a candidate for partisan office before resigning from the bench).[1]

3. Petitioners assert that fund-raising and other campaign activity continued during the period from the date of his announced plans to run and his resignation from

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1. We show, *infra*, that Ohio Law defines a candidate in a primary as one who has issued a formal declaration, filed petitions, and paid the statutory filing fee before the statutory cutoff date. See pp. 8 to 9, *infra*, and Ohio Revised Code Sections 3513.01 to 3513.10.

the Court. Petition at 19. The record is silent on this point.

4. Petitioners state that the Ohio Chief Justice "stood to gain or lose hundreds of thousands of dollars depending on how his judicial actions affected his campaign" and that he had the "hope of attracting campaign money" from the AFL-CIO. Petition at 16. The record below contains no evidence to support such assertions.

5. Petitioners present a report of the alleged March 8, 1982, conversation with Chief Justice Celebrezze and of the March 9, 1982, proceedings in the Ohio Supreme Court conference room. No record was made of the proceedings and counsel for the Respondents were not present. Petition at 11. Petitioners purport to summarize some of the opinions of the justices, without naming or enumerating the supporters of a position. Petitioners tell us that some members suggested that petitioners present their arguments directly to the United States Supreme Court. Petition at 11. None of these allegations have any support in the record below.

6. Petitioners state that proceedings such as the March 9, 1982 conference are "unprecedented". The record below contains no basis for this assertion.

7. Petitioners allege that Chief Justice Celebrezze resigned and rescinded that action on March 9, 1982. They append two newspaper reports to support those allegations. Petitioners assert that the articles were not part of the record below because they occurred after the petitions for rehearing in *St. Vincent* and *Minster Machine* were filed. Pet. at 12, n.9. The petition for rehearing in *Cincinnati Milacron*, however, was filed later, on March 15, 1982.

8. The "Political Committee Finance Report" dated Nov. 30, 1981, was inserted by petitioners for the first time in the Appendix to its Petition for Certiorari. See Petition at 9, Pet. App. at 164-201. The report is allegedly a public record. On its face, it shows a filing date of Nov. 30, 1981, more than three months before the filing of petitions for rehearing in the three cases.[2]

9. Petitioners argue that the Ohio AFL-CIO and other labor organizations contributed at least $4,000 to the Appreciation Dinner Committee and that the AFL-CIO submitted an *amicus curiae* brief in *Cincinnati Milacron*. Petition at 9. The Report itself shows a contribution from the Ohio AFL-CIO of $100. Pet. App. at 174. The Amicus brief was submitted by the Ohio AFL-CIO. Pet. App. at 203-204.

10. Petitioners assert that the *Minster Machine* case announced a "new standard of strict liability." Petition at 8. In fact, in *Minster Machine*, the Ohio Supreme Court relied extensively on the case of *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456 (1981), see Pet. App. at 66, a case decided only eighteen months before *Minster Machine*. Chief Justice Celebrezze voted with the majority in *Leichtamer* Justice Holmes, dissenting in *Min-*

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2. The campaign report leaves many questions about the facts alleged and implied by petitioners. Petitioners argue on the basis of the report that Chief Justice Celebreeze knew about these contributions and was likely to be influenced by them in his decisions. Indeed, the issue of whether the committee is partisan or nonpartisan does not appear on the face of the document. The bare report is an insufficient basis for such inferences, even if the report were properly before this Court. The alleged contributions were to an "Appreciation Dinner Committee" Pet. App. at 164. We are left to guess about the makeup of the committee, the relationship to the gubernatorial campaign, and the degree of involvement, if any, of the Ohio Chief Justice in any of the activities of the committee. In short, the campaign report, fails to provide a context for the serious inferences which petitioners attempt to draw from it.

ster Machine, acknowledged the similarity of the cases, stating that "I continue to adhere to my position, articulated in my dissent in *Leichtamer*. . . ." See Pet. App. at 74. The *Leichtamer* case in turn followed the decision in *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317 (1977) which declared strict liability in tort to be the products liability rule in Ohio. Chief Justice Celebrezze wrote the opinion of the Court in *Temple*.

11. In the *Cincinnati Milacron* decision, only two justices dissented from the result. Justice Locher, concurring in part and dissenting in part, agreed with the one paragraph syllabus in the case[3] and with the result—a remand to the trial court.

12. Petitioners state as a fact in the Statement of the Case, that Chief Justice Celebrezze's concurring opinion in *Cincinnai Milacron* has "the unmistakable ring of political speechmaking." Petition at 10. The assertion is opinion not fact.[4] Chief Justice Celebrezze and Justice Brown issued concurring opinions responding to Justice Krupansky's dissent. Pet. App. at 18-22. Justice Brown, wrote *inter alia*: ". . . workers' safety should rank higher on our scale of human values than that rallying cry and maxim: 'Profit is not a dirty word in Ohio.' What's good for workers is good for Ohio." Pet. App. at 22. The record does not show whether Justice Krupansky or Justice Brown were candidates for nonjudicial office.

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3. The syllabus is the only authoritative statement of the law in Ohio judicial opinions. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

4. Petitioners fail to cite the dissenting opinion of Justice Krupansky in *Cincinnati Milacron* which predicts "catastrophic results" from the decision. Justice Krupansky argues that the majority decision is an act of "irresponsibility for the benefit of a few (workers)at the detriment of so many." Pet. App. at 27.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The writ should not be granted here because:

1. The record is devoid of reliable authenticated evidence to support the federal question asserted.

2. The issue presented by petitioners is primarily an issue of state law. Under Ohio law, the Ohio Chief Justice was not a candidate for nonjudicial office.

3. Petitioners did not pursue available remedies at the state level at a time when they first knew or should have known about the ethical issues. Failure to pursue those remedies prior to the outcome of the cases gives petitioners the unfair advantage of knowing the outcome of a collegial decision before raising the issue of disqualification.

4. Petitioners have failed to meet their burden of rebutting the strong presumption of regularity of legal proceedings.

5. Petitioners fail to present a colorable equal protection argument.

1. The Record Is Devoid of Evidence to Support the Factual Allegations or Legal Conclusions Advanced by Petitioners.

The basis for review of a decision of a state supreme court by way of certiorari must be found in the record of that Court. *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 391 (1836). In our Statement of the Case, we have demonstrated the paucity of factual information in the

record below. The constitutional issues were not raised until after the cases were decided. The record is "very likely to be inadequate, since it was not compiled with . . . (the constitutional issues) in mind." *Cardinale v. Louisiana, supra,* 394 U.S. at 438.

The record is absolutely devoid of sworn testimony on the federal questions which petitioners attempt to raise.

Moreover, the petitioners improperly discuss *ex parte* proceedings as part of their Statement of the Case. The same Canons of Judicial Ethics upon which they rely declare unmistakably that *ex parte* proceedings are improper. Canon 3(A)(4), 36 Ohio St. 2d at xxii. The lawyers' participation in such proceedings violates the American Bar Association's Code of Professional Responsibility, which is applicable in Ohio. DR7-110(B), 23 Ohio St. 2d 51-52 (1970); Rule IV, Supreme Court Rules for the Government of the Bar of Ohio, Rules Governing the Courts of Ohio, 577-578 (Anderson 1981). See also Rule VI. *Id.* at 587-588; Appendix, *infra* at A1 to A6-A7. Yet, Counsel for petitioners apparently participated in the alleged conference, failed to insist that a record be made, produced no contemporaneous report of the proceeding, and now seek to use the proceedings to advantage in their supposedly neutral Statement of the Case.[5] The report of the conference is irrelevant to petitioners' legal arguments and seems included primarily for emotional effect.[6] See Petition at 11, 24. Petitioners' indignation about ethical issues seems unduly selective.

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5. Cf. *Markowitz v. Toledo Metropolitan Housing Authority,* 608 F.2d 699, 704 (6th Cir. 1979).

6. The newspaper reports of the alleged resignation of the Ohio Chief Justice also seem designed for emotional effect. The alleged occurrences took place after the denial of the motion for rehearing. Petitioners fail to connect them to their legal arguments.

2. Under Ohio Law, the Ohio Chief Justice Was Not a Candidate for Nonjudicial Office.

Petitioners' constitutional arguments rely on the premise that the Ohio Chief Justice was a candidate for partisan nonjudicial office.[7] The question of whether Chief Justice Celebrezze had become a candidate at any time prior to the disposition of these cases depends on application of Ohio law to disputed and complex facts. Under Canon 7(A)(3) of the Canons of Judicial Conduct, as enacted in Ohio, the question is whether he was "a candidate . . . in a party primary . . . for a nonjudicial office." Because he was allegedly a candidate for the Democratic gubernatorial nomination in Ohio, Ohio election laws govern the definition of candidacy.

Ohio primary election statutes are clear and exacting in their definition of the term "candidate". A person desiring to be a candidate for the office of governor in a primary election shall comply with Section 3513.04 of the Ohio Revised Code not later than four p.m. of the seventy-fifth day before the date of the primary. Ohio Revised Code §3513.05. The primary is held on the first Tuesday after the first Monday in June. Ohio Revised Code §3513.01 (This court can take judicial notice that the deadline for filing the declaration of candidacy was March 24, 1982, more than four weeks after the decision below.)

The specific requirements for becoming a candidate include "filing a declaration of candidacy and paying the required filing fee." Ohio Revised Code §§3513.04 and 3513.10. Petitions signed by registered voters must be in the statutory form and include the declaration of candidacy

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7. Petitioners agree that the issue is one of state law. They assert that their right under 7(A)(3) is a "state-created right". Petition at 20.

prescribed in Section 3513.07. One thousand voters of the same political party as the prospective candidate must sign the petitions. Ohio Revised Code §3513.05.

There is no evidence in the record that the Ohio Chief Justice had complied with any of the above provisions. Under Ohio law, he was not a candidate.[8]

3. Petitioners Waived Their Federal Claims by Failure to Raise Them at the Earliest Opportunity in the State Court.

Petitioners first raised their federal constitutional claims by motion for rehearing to the Ohio Supreme Court. Petition at 10-11. The traditional rule, of long standing application, has been that federal questions must be raised at the earliest possible opportunity or they will be deemed an insufficient basis for the grant of a Writ of Certiorari. *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, concurring); *Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-195 (1925); *Consolidated Turnpike Co. v. Norfolk Ocean View Railway Co.*, 228 U.S. 326, 334 (1913); *Harding v. Illinois*, 196 U.S. 78, 84-85 (1904); *Grame v. Mutual Assur. Soc. of Virginia*, 154 U.S. 676 (1881); *Simmerman v. Nebraska*, 116 U.S. 54 (1885); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 397-398 (1836).

Petitioners' filing of a motion for rehearing in the Court below cannot compensate for the failure to pursue

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8. Canon 7(A)(3) has been interpreted as permitting preliminary surveys of financial aid and voter support without becoming a formal "candidate." *Morial v. Judiciary Comm. of Louisiana*, 565 F.2d 295, 301 (5th Cir. 1977). Such an interpretation may be necessary to avoid serious First Amendment issues. *Ibid.* A potential candidate need not "balance a secure judgeship against a complete leap in the dark." *Ibid.*

predecisional opportunities to present the federal question to the state court. *Harding v. Illinois, supra; Grame v. Mutual Assur. Soc. of Virginia, supra; Simmerman v. Nebraska, supra.*

Petitioners had adequate opportunities to present their constitutional claims prior to the Ohio Supreme Court decisions.

Assuming *arguendo* that the Ohio Chief Justice was a candidate for nonjudicial office, the appropriate remedy for a violation of the State Canon of Judicial Conduct is either a motion to disqualify or the initiation of disciplinary processes. Petitioners used neither of these procedures. Instead, they awaited the outcome of the collegial decision making process. Having lost on the merits, they now seek a second opportunity to litigate the same issue.

Petitioners concede that the right which they claim was violated in these proceedings is a "state-created right". Pet. at 20. The Supreme Court of Ohio adopted the Code of Judicial Conduct, effective December 20, 1973. Pet. App. at 1, 36 Ohio St. xix. Rule IV of the Supreme Court Rules for the Government of the Bar of Ohio provides that the Code of Judicial Conduct "shall be binding upon *all* judicial officers of this state." Rules Governing the Courts of Ohio 571, 577 (Anderson 1981) (Emphasis Added). *See also* Rule VI. *Id.* at 587-588.

The Ohio Supreme Court has plenary power to enforce the standards of the Code of Judicial Conduct by virtue of its power to regulate the practice of law and "all other matters relating to the practice of law." Ohio Constitution, Art. IV, §2(g). *Mahoning County Bar Assn. v. Franko*, 168 Ohio St. 17 (1958). The Ohio Supreme Court has promulgated rules whereby complaints may be filed against judges for violation of the Code of Judicial Conduct. Ohio

Supreme Court Rules for the Government of the Bar of Ohio, Rules IV to VI, Rules Governing the Courts of Ohio, 576-588 (Anderson 1981). Since at least 1954, the Ohio Supreme Court has declared by rule that the Canons of Judicial Conduct are "binding on all members admitted to the practice of law in the State of Ohio." *Mahoning County Bar Assn. v. Franko, supra,* 168 Ohio St. at 21. Penalties for violation of the Code of Judicial Conduct include retirement, removal or suspension from office or reprimand, suspension or disbarment from the practice of law. Rules IV, VI, *supra.*

The Ohio Supreme Court has expressed a commitment to monitor the behavior of judges according to the standards of the Code of Judicial Conduct. *Mahoning County Bar Assn. v. Franko, supra,* at 168 Ohio St. at 23. Indeed in that case, the Ohio Supreme Court suspended a judge indefinitely from the practice of law for failure to resign his judicial position before becoming a candidate for prosecuting attorney.

If the copy of the press release dated January 15, 1982, is authentic and reliable, petitioners learned or could have learned the content of that release on that date.

Petitioners could have filed a grievance complaining of the fact that the Ohio Chief Justice continued to serve as a judge while arguably a candidate for Governor.

Moreover, Petitioners, as litigants before the Ohio Supreme Court, had opportunities to protect their own rights in the pending litigation. The Ohio Supreme Court, as shown above, has plenary power to enforce the Code of Judicial Conduct. While there is not a specific rule or statute in Ohio providing for disqualification of an Ohio Supreme Court Justice, the Ohio Supreme Court has the inherent power to consider such a motion.

Petitioners assert that the petition for rehearing was the first available opportunity to raise the issue of disqualification, citing the fact that Ohio's disqualification statutes do not apply to the Ohio Supreme Court. Petition at 11, note 7. The argument does not withstand analysis. The procedure for rehearing does not specifically provide for raising the issue of disqualification, yet petitioners raised it. By the same logic, they could have raised the issue by motion to the Ohio Supreme Court while the cases were pending.

The effect of following any of the above procedures prior to the decisions in the cases under review would be dramatically different. First, the Ohio Chief Justice individually and the other Justices collectively would have had an opportunity to confront the issue before the rights of the parties were affected by a final written opinion. See *Cardinale v. Louisiana, supra* at 439. Second, respondents could have participated in the development of the factual and legal arguments and protected the interests of their clients. Finally, petitioners would have avoided the appearance of "double-dipping" inherent in moving for the disqualification of a justice only after his vote was known to be adverse to them.

This Court should not condone the untimely and unfair litigation of this issue after the merits of each case have been fully litigated and the rights of the parties settled in considered opinions announced by a seven-member court.

4. Petitioners Fail to Meet Their Burden of Rebutting the Strong Presumption of Regularity and Constitutionality in the Legal Process.

Petitioners argue from another[9] faulty legal premise in their due process claim. They subtly attempt to shift the burden of proof by arguing that courts cannot presume that a judge who is a candidate will be impartial on the bench. Petition at 18. The legal standard is exactly the opposite.

Judicial action is presumed to be "unbiased". *Schweiker v. McClure*, ... U.S. ....., 102 S. Ct. 1665, 50 U.S. L.W. 4406, 4408 (1982). One who challenges the actions of a judge "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47, 55 (1975). See also *Tumey v. Ohio*, 273 U.S. 510, 517 (1927). This premise is a corollary of the familiar doctrine that governmental actions are presumed to be constitutional. *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 2771-2772 (1980); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Planned Parenthood of Cent. Mo. of Danforth*, 428 U.S. 52, 79-81 (1976); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

The test of the constitutionality of the judicial action in this case is whether an average person, sitting as a judge, would be tempted to alter a decision on the basis of nonjudicial considerations. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). The mere surface appearance of overlapping judicial and executive functions is not sufficient to strike down judicial action on the basis of conflict of interest and due process violations. *Ibid.*

This Court has expressly avoided the creation of a *per se* rule under which all judicial action with a surface

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9. See also Argument 2, *supra* at pp. 8 to 9.

appearance of impropriety would be voided. Practical considerations in a "governmental structure of great and growing complexity" dictate a tolerance for some overlap of functions. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Considerations of finality of legal decisions also enter into the balance in a case such as this, in which the challenge is raised against one member of a collegial court that has rendered its decision.

In lieu of a *per se* rule, the Court has chosen to rely on careful analysis and balancing, on a case-by-case basis of the likelihood of actual bias and partiality affecting the specific decisions under question. *Schweiker v. McClure, supra; Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S. Ct. 1610 (1980); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Ward v. Village of Monroeville, supra; Tumey v. Ohio, supra.* As a starting point for analysis, the party claiming judicial impropriety has the burden of convincing the Court, "under a realistic appraisal of psychological tendencies and human weakness" that the conduct "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin, supra*, 421 U.S. at 47.

Petitioners attempt to avoid their burden and bypass the legal standard by arguing for a *per se* rule. Their argument would require that the Court rule illegal and void every action by a judge who announced a prospective candidacy for a nonjudicial office. Petitioners' position would require a dramatic reversal of the present standard which requires a "probability of unfairness" and a "probability of actual bias" before adjudicatory behavior will be proscribed on due process grounds. *Ibid.*

Nor can the petitioners meet this burden of proof on the barren record in this case. Indeed, they have failed

to present a single item of authenticated, reliable evidence to support their bald assertions of bias. Even assuming arguendo that some record of "campaign" contributions is properly before Court, petitioners have not met their burden of showing that either the alleged candidacy or the alleged campaign contributions were likely to influence the Chief Justice in his decisions in the three cases under review—or that they would be likely to influence the average person.

In the cases before the Court, the Ohio Chief Justice's votes are entirely consistent with his previous votes on similar issues. In the *Minster Machine* case, Chief Justice Celebrezze's participation in the majority was consistent with his vote in the *Leichtamer* case, decided eighteen months earlier, and with his written opinion in the *Temple* case, decided five year earlier. Similarly, in *St. Vincent Hospital v. Zak*, the decision of the Ohio Supreme Court interpreted the malpractice statute of limitations consistently with prior interpretations. *Hocking Conservancy District v. Dodson-Lindblom Associates, Inc., et al.*, 62 Ohio St. 2d 195, 404 N.E.2d 164 (1980); *Whitt v. Columbus Cooperative*, 64 Ohio St. 355, 415 N.E.2d 485 (1980). See also *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964). In the *Whitt* case, the Court held unanimously that the statutory term "malpractice" was limited to the common law definition (primarily physicians and lawyers). Chief Justice Celebrezze voted with the majority in both cases.

In short, the decisions were independent of the contributions. There is no evidence that the contributions were intended to influence future court decisions or that they would be likely to do so.

Petitioners' argument apparently rests on one of two factual premises. The first is that the campaign contribu-

tions from *amicus curiae*, allegedly given long before the *amicus* briefs were filed, influenced the Ohio Chief Justice's decision in those cases. On its face, this proposition proves too much. If the Court is to presume that a judge discards impartiality by accepting a campaign contribution from an *amicus curiae*, the Court cannot limit that presumption to *non-judicial* campaigns.[10] Petitioners present no psychological principle or evidence that would permit us to conclude that the judge who receives support for a *judicial* campaign is less likely to be influenced by the wishes of campaign contributors.

Based on traditional experiences with campaign contributions, we as a nation have chosen to presume that campaign contributions, without more, do not influence specific votes and decisions. We know that there are scandalous exceptions to this risky proposition, yet we accept the aberrations as a part of the price of democracy. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

The second factual premise of petitioners' due process argument appears to be that Chief Justice Celebrezze's alleged announced intention to become a candidate for Governor of Ohio at some future date influenced, or was likely to influence, his votes in the three cases at issue. The underlying assumption is that the announcement would cause him to alter his previous judicial philosophy and mask his legal analysis to present a different face to the electorate. Petitioners fail to address this assumption. We have shown that Justice Celebrezze's votes in these cases were indeed consistent with his prior judicial decisions.

Petitioners rely heavily on the cases of *Tumey v. Ohio*, *supra* and *Ward v. Village of Monroeville*, *supra*. Both

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10. Contributions to judicial campaigns are expressly permitted under Canon 7(B)(2) of the Canons of Judicial Conduct.

of these decisions involved situations in which the judicial officer stood to gain in a direct and immediate way from the decision in the case. In *Tumey*, the benefit to the mayor was the fees and costs paid by a defendant only if convicted. 273 U.S. at 520. In *Ward*, the benefits to the mayor were the fines, forfeitures, fees, and costs which comprised a substantial portion (up to 50%) of the village's revenues.

Ward and *Tumey* are far removed from the cases at issue here. In both *Ward* and *Tumey*, the benefit was directly and immediately dependent on the decision in each case. Upon conviction, the village and the mayor received revenue; upon acquittal, they received none. In the cases under review, there is no such connection. Contributions were made in the past without restrictions. Indeed, it would have been a serious criminal offense to either offer or accept restrictions on the contributions related to future decisions in cases. Ohio Rev. Code §2921.02. *See also* §2921.43. The decisions were issued without any promise of future benefit. In short, our cases do not involve the "direct, personal, substantial, pecuniary interest" in reaching a conclusion against the interests of defendants that was involved in *Tumey*. 273 U.S. at 523.

Finally, *Ward* and *Tumey* are distinguishable because they involved decisions by individual judges. In the case at bar, we have a considered decision, with written opinions, from a collegial court of seven justices. No single justice has the power to govern the outcome. Each justice, in turn, is subject to the checks and balances of collegial decision-making and the issuance of written opinions.

5. The Ohio Supreme Court Afforded Petitioners Full and Equal Protection of the Laws.

Petitioners argue that their "state-created right" to enforce the Canons of Judicial Conduct were abrogated by the procedures in these cases. That right, they assert, is to have all decisions made by judges who have not declared an intent to be a candidate for political office in the future.

There are several fatal flaws in this argument. The first is that petitioners assert not merely the right, but also the remedy. Respondents do not dispute that the Code of Judicial Conduct includes a mandatory directive that a judge who becomes a political candidate resign from the judgeship. Even assuming arguendo that this rule was violated by the Ohio Chief Justice,[11] the Code of Judicial Conduct does not say that any action by a judge sitting in violation of the rule is null and void. Petitioners would have the Court imply a remedy which is not apparent on the face of the Code—a remedy with grave implications for the administration of justice. They would have the Court imply such a remedy under the guise of a "state-created right" without benefits of discussion or relevant precedent.

According to petitioners' count, over 95 cases were handed down during the period between the alleged issuance of Chief Justice Celebrezze's press release and his alleged resignation from the Court. Petition at 6. All these decisions, and countless administrative actions by Chief Justice Celebrezze acting for the entire court (e.g.

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11. Petitioners assume without proof or argument the violation of the rule. They fail to show, or even cite precedent to the effect that, a statement of intent to become a candidate in the future automatically makes one a candidate in the present. See pp. 8-9, *supra*.

granting leaves to file amicus briefs, Pet. App. 204, 209) would be called into question under petitioners' theory. The enormity of the consequences for the administration of justice dictate that the Court look elsewhere for a remedy.

We have shown above, in Section 2, that petitioners had other remedies to protect their right to a decision by a tribunal which met all of the conditions of the Code of Judicial Conduct. They chose, either explicitly or implicitly, to submit their cases to the Ohio Supreme Court as then constituted. The failure to raise an objection before the decisions were known amounts to a waiver of any right to a different decision maker. Even if this Court were to adopt a rule that actions taken by a judge in violation of the Code of Judicial Conduct were void, the Court could not reasonably apply such a rule to a litigant who knew, or should have known, of the defect and chose not to assert it before the decision.

The final problem with petitioners' equal protection argument is that it is not supported by precedent. The cases cited by petitioners are *Mills v. Habluetzel*, 102 S. Ct. 1549, 1551, 1553 (1982); *Gomez v. Perez*, 409 U.S. 535, 538 (1973); and *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Petition at 22. Each of these cases involved a degree of invidiousness which is not present here.[12]

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12. *Mills* and *Gomez* each involved claims by illegitimates to equal access to the civil justice system to present cases of nonsupport. These decisions evolve from the Court's concern that illegitimacy is "a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society." *Matthews v. Lucas*, 427 U.S. 495, 505 (1976). As such, illegitimacy classifications are entitled to more than "toothless" scrutiny for equal protection violations. *Trimble v. Gordon*, 430 U.S. 762, 767 (1977). *Griffin v. Illinois*, is similarly inapposite. In *Griffin*, the Court struck down on equal protection grounds a state law which denied an appeal to an indigent convicted defendant in a criminal case. The Court in *Griffin* exhibited its traditional concern about the patent irrationality of absolute deprivations based on poverty. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 23-24 (1973).

Petitioners present no equivalent line of analysis. There is no near-suspect classification here, nor is there an absolute deprivation of some important interest. To the contrary, petitioners have not even experienced a relative deprivation of any interest. They fully litigated the merits of their cases and now claim the lack of a tribunal equivalent to that afforded others. They have had a full and equal opportunity to litigate their claims. They are entitled to no more.

CONCLUSION

The decisions below dealt with issues of state tort law that are important to the individual litigants. Petitioners are dissatisfied with those decisions because of their economic implications. They now attempt to interpose an *ex post facto* challenge to the qualification of one member of a collegial court. The Ohio Supreme Court rendered each decision after full and fair legal argument. This Court should not upset the legitimate expectations of the individual litigants on such a contrived afterthought.

Respectfully submitted,

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APPENDIX

SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO

Rule IV

PROFESSIONAL RESPONSIBILITY AND JUDICIAL ETHICS

(1) The Code of Professional Responsibility, as adopted by this Court on October 5, 1970, and set forth in 23 Ohio State 2d Reports, shall be binding upon all persons admitted to practice law in the state of Ohio, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio. The Code of Judicial Conduct, as adopted by this Court, effective December 20, 1973, and set forth in 36 Ohio State 2d Reports, shall be binding upon all judicial officers of this state, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V, or by retirement, removal or suspension from office, as provided in Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

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Rule V

DISCIPLINARY PROCEDURE

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(5) Definitions.

(a) Misconduct. Misconduct shall mean any violation of any provision of the oath of office taken upon

admission to the practice of law in this State or any violation of the Code of Professional Responsibility or the Code of Judicial Conduct as adopted by the Court from time to time, disobedience of these rules or of the terms of an order imposing a suspension from the practice of law, or the commission or conviction of a crime involving moral turpitude.

Rule VI

REMOVAL OF JUDGES

Pursuant to legislative authority provided by R.C. 2701.11 and 2701.12, the following rule is adopted, effective February 11, 1966.

1. (a) The written and sworn complaint required by R.C. 2701.11 shall be filed with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court heretofore established under Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, who shall transmit such complaint to the Chairman of the Board. Six copies of the complaint shall be so filed. The complaint shall set forth specifically the grounds claimed to be cause for retirement, removal, or suspension of the Judge from office and time when and place where any act, acts, omission or omissions occurred which are alleged to be cause for such retirement, removal or suspension under R.C. 2701.12. Complaints filed by the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association and by a Grievance Committee of any regularly organized bar association in the state shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing, signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the

Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state (which association shall be deemed the Relator), certifying that such counsel are duly authorized to represent the Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes that reasonable cause exists to warrant a hearing on such complaint and shall constitute the authorization of such counsel to represent the Relator in the premises as fully and completely as if he or they were designated and appointed by order of the Supreme Court of Ohio, with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved by the acts or omissions of the Judge against whom the complaint is filed. Complaints filed by Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as Relator.

* * * * *

(c) In addition to the cause for removal or suspension of a judge, as provided in R. C. 2701.12, a judge may be removed or suspended from office if he engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute, or if he has been indefinitely suspended from the practice of law or permanently disbarred.

2. Upon receipt of such written and sworn complaint by the Chairman of the Board of Commissioners on Grievances and Discipline of the Supreme Court, he shall, as soon as practicable, convene such Board and present to it the complaint. The Secretary of the Board of Commis-

sioners shall send a copy of such complaint to the Judge against whom the complaint is made. The Board shall then proceed to investigate the complaint. After completion of this investigation, if two-thirds of the members of such Board affirmatively determine that there is substantial credible evidence in support of the complaint, the Secretary of the Board of Commissioners shall certify to the Supreme Court the result of such investigation. The investigation conducted by the Board of Commissioners shall be private. The Board shall have authority to issue subpoenas for such witnesses as are deemed necessary. Subpoenas may be signed by any member of the Board or the Secretary.

3. The report of the Board of Commissioners on Grievances and Discipline shall be sent by certified mail to the Judge against whom the complaint is made at the same time such report is sent to the Supreme Court.

4. The Supreme Court shall, if the report finds there is substantial credible evidence in support of such complaint, appoint within a reasonable time after its receipt a Commission of five Judges, as provided in R. C. 2701.11.

5. The Chairman of the Commission of Judges appointed to determine the question of retirement, removal or suspension of a judge shall be designated by the Supreme Court. Such Chairman shall promptly after receipt of the notice of his appointment and the receipt of the complaint fix a day for the hearing. Such hearing shall not be in the county seat of the county in which the Judge complained about resides unless requested by the Judge against whom such complaint is made. The Chairman shall determine, in the absence of such request, the place and time of the hearing. The hearing shall be private, with full opportunity for relator and respondent to present witnesses.

6. If the Commission of Judges determines by majority vote that grounds for retirement, removal or suspension without pay have been established by clear and convincing evidence as alleged in the complaint or as provided in R. C. 2701.12 the Commission of Judges shall make such order as in its judgment is necessary and proper. Notice of any order so made shall be sent by registered mail with return receipt to the Judge against whom the finding has been made and the Supreme Court.

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8. Any Judge so retired, removed, or suspended may appeal to the Supreme Court on the record made before the Commission of Judges from the action of the Commission. Notice of such appeal shall be given by the Judge to the Commission of Judges and the Supreme Court within 20 days after his receipt by registered mail of the findings made by the Commission. Thereafter, the time for filing a transcript of testimony, briefs, and the conduct of a hearing shall be as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

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10. The Commission of Judges may take testimony in any manner prescribed by the law of the state of Ohio. All rules of evidence shall be observed in the conduct of hearings before the Commission of Judges. The parties may be represented by counsel.

11. The Commission of Judges shall issue subpoenas for witnesses under the seal of the Supreme Court, signed by a member of the Commission of Judges or the Secretary of the Commission.

The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm or to answer any proper question shall be deemed

contempt of the Supreme Court, and such person shall be punished accordingly.

12. Costs and expenses herein incurred by the Board of Commissioners and the Commission of Judges shall be paid from the Admissions and Grievance Fund of the Supreme Court, and the Court may order that such fund be reimbursed by the Respondent if the proceeding terminates in retirement, removal or suspension without pay.

13. This Rule and such regulations relating to investigations and proceedings involving complaints and petitions for reinstatement shall be liberally construed for the protection of the public and the Courts and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the adoption of this Rule.

(Amended, eff 1-1-81)

CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-110 Contact With Officials.

• • • • •

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

CODE OF JUDICIAL CONDUCT

Canon 3

A. Adjudicative Responsibilities

• • • • •

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief amicus curiae.

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No. 82-10

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FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., ET AL.,
Petitioners,

—against—

EDWARD BLANKENSHIP, ET AL.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITZ,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER
and ELLA AMBATS,
Petitioners,

—against—

ADELINE T. ZAK and THADDEUS O. ZAK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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INTRODUCTION

Respondents obviously hope that enough accusations, color words and string citations (however wrong or irrelevant) will lead this Court to deny the Petition here and leave for another case and day the important questions presented.

Respondents' procedural "reasons" for denying the Petition are frivolous. Their substantive reasons, if adopted by written decision of this Court, would turn decades of constitutional adjudication on its head. Denial of the Petition for these reasons will work real and irreparable injustice and will let stand judicial misconduct that undermines the integrity of Ohio's judicial system.

We discuss respondents' arguments in the order presented in their brief ("Resp. Br.").

One: The Adequacy of the Record

On January 15, 1982—after the cases here were argued and while they were pending in the Ohio Supreme Court—the Ohio Chief Justice announced his candidacy for the Democratic Party nomination for Governor but refused to resign his judicial office. His January announcement was no mere testing of the waters. It was made to *end* "public speculation concerning [his] becoming a candidate". "I will be a candidate", the Chief Justice announced. "[T]his decision is right." (App. 161.)

Respondents want this Court to ignore the Chief Justice's press release because it is "unauthenticated", "never admitted into evidence" and accompanied by "no evidence of its release to the public". (Resp. Br. 2.)

These arguments are frivolous. The press release:

(a) was printed on the Chief Justice's official stationery;

(b) was confirmed by contemporaneous newspaper accounts as to which respondents make no objection (*see* App. 121-122);

(c) was submitted to the Ohio court as part of all three motions for rehearing; and

(d) was never challenged either by the Ohio court or by respondents below (despite their opportunity to do so in the *Milacron* case).

To ignore the Chief Justice's press release and what its issuance means for the impartiality and the integrity of the state's judicial process would be an outrage.

And the Chief Justice's campaign activities plainly did not stop with that release. He or his organization continued to solicit campaign funds and at the very least arranged the campaign dinner held on the night he finally resigned. But respondents want this Court to ignore these facts too: The "record is silent" on them we are told. The newspaper accounts that contain them are included "for emotional effect". (Resp. Br. 3, 7 n.6.) These arguments, too, are frivolous:

1. Respondents cannot question the truth of the facts contained in the news accounts and do not attempt to do so.

2. Respondents concede—as they must—that the newspaper accounts (App. 210-214) are properly before this Court at least with respect to petitioners in *St. Vincent* and *Minster Machine*. (Resp. Br. 3.) Under the circumstances, it makes no sense to ignore them with respect to the *Milacron* petitioners.

3. The newspaper accounts, from different papers, in different Ohio cities, are clearly relevant. They show that Chief Justice Celebrezze

—resigned from office to run for Governor as he announced he would in January;

—attended a campaign dinner on the night he resigned; and

—"did a complete about face in less than 24 hours" and withdrew from the campaign, reportedly for financial reasons. (App. 210-214.)

Respondents also want this Court to ignore the Chief Justice's handling of the motions for rehearing decided on March 9—the day he resigned. Respondents charge that petitioners' recital of those events is for "emotional effect" only, and accuse petitioners' counsel of improper conduct for attending the *ex parte* conference called by the Ohio court. (Resp. Br. 7.)

Petitioners did not seek or want that conference. They were ordered to be there by the Chief Justice personally and when they asked about having opposing counsel present, the Chief Justice said he did not want them there. When petitioners asked what the conference was about, he refused to tell them. The conference was most certainly improper, as respondents observe, but its impropriety cannot be blamed on petitioners.

Further, the circumstances of that conference are plainly relevant. They show at minimum, *one*, that the Chief Justice and the Ohio court took unprecedented steps to deny rehearing in *St. Vincent* and *Minster Machine* on the very day the Chief Justice was going to resign and attend a campaign dinner, and, *two*, that the Ohio court in fact considered the federal question raised on rehearing and gave no inkling of any state procedural infirmity with that claim.

Two: Ohio's Election Statute

Despite the Ohio Chief Justice's avowed candidacy and campaign activities, respondents argue that a constitutional challenge to his behavior must fail because he had not yet perfected his candidacy under the "specific requirements" of Ohio election law. (Resp. Br. 8-9.) Respondents' argument would allow a state judge to engage in the most extensive and egregious political campaigning, refrain until the last day from

filing as a candidate under applicable state election law, and be immune from federal constitutional challenge.

The short answer to this argument is: a state's labels do not control federal constitutional rights. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *In re Gault*, 387 U.S. 1, 49-50 (1967); *NAACP v. Button*, 371 U.S. 415, 429 (1963). The question here is not whether the Chief Justice perfected his candidacy under Ohio election law, but whether his position as candidate for Governor created an interest that was impermissibly at odds with the Constitution's requirement of fair and impartial judicial decisionmaking.

Three: Petitioners' Supposed "Waiver"

Respondents accuse petitioners of deliberately "bypass[ing] opportunities" to raise their federal claims, "await-[ing] the outcome" on the merits, and thereby waiving their federal rights. (Resp. Br. ii, 10.)

There was no thought or attempt to bypass any available state remedy or to await the outcome on the merits. Petitioners moved promptly, under the first procedures available to them.

The only remedy that respondents point to as being "bypassed" is the commencement of separate grievance proceedings against the Chief Justice. Yet respondents themselves acknowledge that that procedure is collateral in nature and could not protect petitioners' "rights in the pending litigation". (Resp. Br. 11.) Respondents nevertheless say now that petitioners should have devised their own procedures and applied to the "inherent power" of the Ohio court—on pain of waiving their federal rights. That would be an extravagant, draconian use of the waiver doctrine and one which has never been sanctioned by this Court.

The Ohio Chief Justice's participation in these cases while a candidate for Governor was appropriately raised in the first and only procedure available to petitioners: their rehearing

motions.[1] Moreover, the Ohio court clearly entertained those motions and the federal claims which were part of them. (*See* Pet. 10-12.) There is thus no basis for any charge of waiver. Petitioners' claims are properly before this Court.

Four: The Supposed Case-By-Case Rule of *Tumey* and its Progeny.

Respondents invite this Court to overrule a half century of constitutional law and hold—without written opinion—that a judge who is a political candidate must be presumed to be "impartial on the bench"—even a judge who accepts "a campaign contribution from an *amicus curiae*". (Resp. Br. 13, 16.) Respondents say that this Court has "avoided the creation of a *per se* rule" and "has chosen to rely on . . . a case-by-case basis". (*Id.* 13-14.)

This argument is a dangerous fiction. A "case-by-case basis" has not been the constitutional rule since *Tumey* and was explicitly rejected over dissent in *Ward v. Monroeville.* (409 U.S. at 62 (White, J., dissenting opinion).) In *Tumey,* this Court unanimously held that if a judge occupies a position which "would offer a possible temptation to the average man" or which is "practically and seriously inconsistent" with his judicial position, then due process of law is denied—irrespective of the particular judge's finances or the finances of his town or party or his supposed judicial consistency.[2] And it does not matter—contrary to respondents'

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[1] Respondents claim that Ohio's "procedure for rehearing does not specifically provide for raising the issue of disqualification. . . ." (Resp. Br. 12.) This is misleading: Rule IX of the Ohio Supreme Court restricts the subject matter for rehearing only as follows: "Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case."

[2] Respondents try to show that the decisions below and the Chief Justice's votes are consistent with prior cases. (Resp. Br. at 4-5, 15, 16.) They plainly are not. *Compare* the Chief Justice's *Temple* opinion (50 Ohio St.2d at 323) *with* the *Minster Machine* majority (App. 69-70). Also *compare* the *St. Vincent* holding *with* the *Whitt* decision (64 Ohio St.2d at 358) where the court and Chief Justice

claim (Resp. Br. 17)—whether the judge is *certain* to benefit personally from a decision one way or another. This Court has never required such certainty. Indeed, in *Ward,* the judge received no direct personal benefit at all. What matters is that a judge may be tempted to rule for one side by the prospect of some gain or by the necessities of a practically and seriously inconsistent partisan position. Both these dangers are present here, as the Petition makes abundantly clear. (Pet. 15-20.) To ignore them is to ignore the realities of political campaigning, the collective judgment of virtually every state in the union and this Court's holding in *Tumey:* one cannot be a political incumbent or candidate and at the same time be an impartial judge.[3]

Respondents' fallback position is equally untenable. They argue that even if the Ohio Chief Justice's position as candidate rendered him unfit to sit as judge, he was nonetheless only one justice on "a collegial court of seven .... No single justice has the power to govern the outcome". (Resp. Br. 17.)

This factor has never mattered in law. A litigant is entitled to unbiased judges even if their actions are not controlling and even if, as was the case in *Ward,* the litigant has the right to a full *de novo* trial before an unbiased judge. (409 U.S. at 61-62.) Here, given the collegial nature of the Ohio Supreme Court, it cannot be said that the Chief Justice's participation had no effect on the ultimate decision. His participation tainted the court's entire decisionmaking, not merely his vote.

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explicitly included hospitals within the contested statute of limitations. Respondents make no effort to show the *Milacron* decision is consistent with prior law.

[3] Respondents suggest that this view proves too much, because *judicial* campaigns by judges are subject to the same objections. (Resp. Br. 16.) Perhaps that is true as a theoretical matter. But Ohio and virtually every other state with an elected judiciary has been capable of making the distinction and has imposed severe restrictions on judicial campaigning in an effort to eliminate dangers of unfairness. (*See* Pet. 5, 8 n.5.)

Five: Respondent's Concluding Arguments.

Respondents make a cluster of arguments at the end of their brief:

1. They argue that if this Court grants the writ and reverses, it will be forced to "imply a remedy which is not apparent on the face of [Ohio's] Code". (Resp. Br. 18.)

This argument makes no sense. Petitioners are not asking this Court to "imply" any unique remedy: On remand, petitioners would simply be entitled to a rehearing on the merits of their state law claims without the participation of the judge whose conduct was the subject of attack for constitutional unfairness. *See, e.g., Taylor v. Hayes,* 418 U.S. 488, 501 (1974). The Ohio court could then sit either with the remaining judges or with additional judges designated for that purpose under the Ohio Constitution, Art. IV, § 2.

2. Respondents stress the "enormity of the consequences" if this Court were to grant the writ and reverse. Over 90 cases "would be called into question", respondents say, and therefore, this Court should "look elsewhere for a remedy". (Resp. Br. 18-19.)

But there is no other remedy. This Court has none available to it and neither do petitioners. To be sure, if this Court reverses, *some* cases will have to be reheard (precisely how many is uncertain), yet that result will have been caused by the conduct of the Ohio Chief Justice and his court. It is no "reason" to deny the writ.

3. Finally, respondents argue that petitioners have shown no suspect classification or any "absolute deprivation of some important interest". (Resp. Br. 20.)

This argument is without substance. *First,* petitioners have shown that they were irrationally singled out. (Pet. 21-23.) *Second,* petitioners have shown that they were deprived finally and without recourse of their state-created right (apart from their federal right) to be heard by judges who are not partisan political candidates. That right is an important one, at the very

"core of due process". *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). Thus, petitioners' equal protection claim is as clear and compelling as their claim to denial of due process.

CONCLUSION

Over 50 years ago this Court held in *Tumey* that when a judge faces a possible temptation "not to hold the balance nice, clear and true" or when a judge holds a partisan position that is "practically and seriously inconsistent" with his judicial responsibilities, a litigant is necessarily deprived of due process of law.

If *Tumey* is still the law, then petitioners are entitled to the writ here. Chief Justice Celebrezze chose to become a candidate for Governor. He campaigned, changed court practice and deadlines for his campaign needs and decided politically volatile cases involving active campaign contributors as *amici*. His conduct and the conduct of the Ohio court deprived petitioners of their right to a hearing before a fair and impartial tribunal.

For these reasons, as set out above and in the Petition, petitioners ask that the writ be granted and that the judgments below be reversed.

Respectfully submitted,

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